CONTENTS.

CASES CITED.

STATUTES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 469.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, NATIONAL COUNCIL OF TRAVELING SALESMEN'S ASSOCIATIONS, ET AL., APPELLANTS,

v.

THE NEW YORK CENTRAL RAILROAD COMPANY, ATLANTIC CITY RAILROAD COMPANY, ATLANTIC & ST. LAWRENCE RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT.

The question is whether an order of the Interstate Commerce Commission directing Class I carriers (with certain exceptions) to issue and put on sale, with appropriate regulations, interchangeable scrip or coupon tickets, at fares 20 per cent less than the

standard passenger fares (or $90 face value for $72) is valid.

The order was entered on specific evidence adduced by the parties before the Commission in pursuance of the statute (Tr. 103–151). The practice of issuing mileage tickets had prevailed for more than 50 years on the part of the carriers with the sanction of statutes and cases, Federal and State. The practice has been universally acquiesced in without question of its legality by the travelling public in both England and America.

The District Court (Circuit Judge Mack and District Judges Morris and Brewster) entered a final decree annulling the order (Tr. 90). Laying hold of the following language of the Commission (which is set forth in the petition, Par. XIV, Tr. 8), "The spirit and the apparent theory of the law is that carriers shall be required to sell such a ticket at something less than the standard fare, which would be just and reasonable because it would be sold in such quantities as to stimulate travel and thereby increase net revenue (Tr. 27) * * *" the District Court held "it is clear" the Commission proceeded on the assumption (Tr. 91) "that the spirit and theory of the Congressional amendment required them to order the scrip coupons to be issued at reduced rates * * *."

Apparently because of those words in the report, and that only, the order was annulled, as the learned District Court continues (Tr. 91): "There is no finding in the record that would indicate that the Com-

mission, if it had exercised an independent judgment apart from what it conceived to be the plain spirit and theory of the amendment, would have ordered the scrip coupons to be issued at reduced rates."

For a case nation-wide in its scope and of such great public importance, that would seem a narrow and technical view on which to overthrow the order. The District Court assumed that the Commission ignored its own order of August 23, 1922, fixing a hearing (Tr. 16, 17) on the question, *inter alia*, "What rate or rates shall be established as *just and reasonable* for each or either form of ticket?"; that the Commission shut its eyes and ears to the voluminous testimony and exhibits before it which have been abstracted for the present record; that the language of the Commission (Tr. 28) "In addition to the obvious spirit of the law, *the record warrants the view* that a coupon ticket at a reasonably reduced fare should be established, at least for an experimental period," and "we further find that the rates resulting from that reduction will be *just and reasonable* for this class of travel," does not mean what it says.

There is no charge in the petition that the order is without substantial evidence to support it. The hearing before the Commission on the questions it propounded is not only fully alleged but its adequacy is not questioned. (Tr. 4, 5.) The very finding "that the rates resulting from that reduction will be just and reasonable for that class of travel" is set out *in haec verba*.

For these reasons the Government filed a motion to dismiss (Tr. 67) and elected to stand (Tr. 90, 91). The decree of permanent injunction hangs by a slender thread. The action of the learned District Court in annulling the order is fully covered by the assignment of errors.

II.

THE STATUTE.

Section 22 of the Act to Regulate Commerce, approved February 4, 1887 (24 Stat. 379, 387), was first amended by the act of March 2, 1889, so as to read (25 Stat. 855, 862):

> That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers and of Soldiers and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards

of managers of said homes; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.

In that form it stood unchanged until the amendment of August 18, 1922 (42 Stat. 827):

An Act To amend section 22 of the Interstate Commerce Act, as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 22 of the Interstate Commerce Act, as amended, is amended by inserting "(1)" after the section number at the beginning of such section and by adding to the section two new paragraphs to read as follows:

"(2) The commission is directed to require, after notice and hearing, each carrier by rail, subject to this Act, to issue at such offices as may be prescribed by the commission interchangeable mileage or scrip coupon tickets at just and reasonable rates, good for passenger carriage upon the passenger trains of all carriers by rail subject to this Act. The commission may in its discretion exempt from the provisions of this amendatory Act either in

whole or in part any carrier where the particular circumstances shown to the commission shall justify such exemption to be made. Such tickets may be required to be issued in such denominations as the commission may prescribe. Before making any order requiring the issuance of any such tickets the commission shall make and publish such reasonable rules and regulations for their issuance and use as in its judgment the public interest demands; and especially it shall prescribe whether such tickets are transferable or nontransferable, and if the latter, what identification may be required; and especially also to what baggage privileges the lawful holders of such tickets are entitled.

"(3) Any carrier which, through the act of any agent or employee, willfully refuses to issue or accept any such ticket demanded or presented under the lawful requirements of this Act, or willfully refuses to conform to the rules and regulations lawfully made and published by the commission hereunder, or any person who shall willfully offer for sale or carriage any such ticket contrary to the said rules and regulations shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined not to exceed $1,000."

III.

THE HISTORY OF THE TIMES UNDER WHICH CONGRESS ACTED.

(a) REFERENCE TO COMMITTEE REPORTS AND DEBATES OF SENATORS AND REPRESENTATIVES IS PERMISSIBLE.

Stafford v. *Wallace*, 258 U. S. 495, 513, Mr. Chief Justice Taft:

> It was for Congress to decide from its general information and from such special evidence as was brought before it, the nature of the evils actually present or threatening, and to take such steps by legislation within its power as it deemed proper to remedy them. It is helpful for us in interpreting the effect and scope of the act in order to determine its validity to know the conditions under which Congress acted. (*Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238; *Danciger* v. *Cooley*, 248 U. S. 319, 322.)

As a means of ascertaining the "history of the times" or "the environment at the time of the enactment of a particular law; that is, the history of the period when it was adopted," the reports and debates may properly be resorted to. (*United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 316, 320; *Standard Oil Co.* v. *United States*, 221 U. S. 1, 50. See also *Church of Holy Trinity* v. *United States*, 143 U. S. 457, 463; *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238.

(b) PROCEEDINGS IN THE SENATE.

On June 27, 1921, the Subcommittee of the Senate Committee on Interstate Commerce conducted its

hearing on S. 331, "A bill to amend section 22 of the Interstate Commerce Act by permitting the issuance of interchangeable mileage tickets on railroads, and for other purposes."

Numerous bills had been introduced (S. 819, 331, 848, 1085, 1249, 1318, 1374, and 1447) providing for the issuance of mileage tickets or books by the carriers at reduced rates. (Mileage Book Hearings, p. 3; Senator Robinson, App. A,[1] p. 58.)

In January, 1922, the proposed amendment was vigorously debated in the Senate, principally on the question whether the act should specifically fix the fare at 2½ cents per mile or whether the reduced amount should be left to the Commission for determination after hearing. The Senate forces who favored then and there fixing the reduction were led by Senator Robinson. Senators who favored the other course (which prevailed) were led by Senators Cummins and Pomerene, thus:

Senator Robinson (Cong. Rec., vol. 62, pt. 2, p. 1332):

> They (the Commission) have the power to promulgate the general rate, which is the same thing in the end, if they choose to exercise it. The difficulty about the matter is this: The commission are overburdened with duties. They are performing very important and very difficult functions. They have been unable to

[1] Appendix A consists of Statements of Senator Robinson, p. 58; Senator Cummins, pp. 67, 68; Senator Pomerene, p. 84; Senator Capper, p. 82; Senator Trammell, pp. 80, 83; Senator Watson of Indiana, pp. 85, 86; Senator King, p. 84.

reach an agreement respecting this subject. Merely to authorize the commission to do something which many think they have the power already to do if they chose to exercise that power, would not be accomplishing very much. But conceding that the commission may not without legislation require the issuance of mileage books, an objection grows out of the fact that great delay will ensue if the matter is relegated to the commission. I do not believe any step Congress can take will more quickly and more vitally restore courage, enthusiasm, and interest among the people of the country in their business affairs than the passage of legislation of this character. It is not a question of general rate making, although, of course, the effect of our action here must be considered in relation to the broader and even more important question of revenues to railroads generally.

It is a comparatively simple matter. If the rate fixed in the bill, in the judgment of the Senate, is too low, if the Senate thinks that the Senator from Indiana (Mr. Watson) in preparing the bill and fixing the rate at which the mileage should be issued at 2½ cents per mile acted unwisely and that the rate ought to be increased, we can do it. We have sufficient intelligence and information respecting the subject to wisely determine it. I think the rate is about right. The enactment of this legislation will have a wholesome effect. I do not see the slightest necessity for throwing it into the Interstate Commerce Commission, where we know there is such a division

> of opinion respecting the policy involved in the legislation and probably its relation to revenue that no action is likely to result if the amendment of the Senator from Iowa is agreed to.

Senator Cummins (Cong. Rec., vol. 62, pt. 2, p. 1399):

> Mr. President, I am not insisting that Congress has no power to establish freight rates or passenger rates. I agree that Congress, if it desired to do so and had sufficient information to do so, could fix every one of the millions of rates upon which transportation is now carried on. I am only saying that if it attempted to exercise that power the transportation of the United States would quickly fall into such confusion that the condition would be intolerable, and I think that the practice would not be persisted in very long. But I am only saying at the present time that if the Congress of the United States now determines that a certain class of its people shall be carried at 2½ cents a mile, the Interstate Commerce Commission, in considering what revenue the railroads ought to receive, must take into account the reduced revenues, if they shall be reduced by the fixing of the passenger rate at 2½ cents a mile, and adjust the freight rates accordingly, for it is fundamental that the railroad companies, if they are to be maintained, must have a revenue derived from the operation of their properties that will be sufficient to maintain them. I repeat, therefore, that if by enacting this

bill we take $5,000,000 or $50,000,000 or $100,000,000 from the revenues of the railroad companies, taken as a whole, then, if the existing revenues of the railroad companies are not more than sufficient to maintain them, it will be the absolute duty of the Interstate Commerce Commission to increase freight rates in order to meet the deficit so created. That must be obvious to the most casual examiner of this subject.

* * * * *

I am not going to assert what the outcome might be so far as increased travel is concerned. That is the very thing that the Interstate Commerce Commission has been considering for more than a year, and it has considered it in the most deliberate way, after the most extensive and exhaustive hearings, and it has fixed the rates accordingly. If it believes that the passenger rates can be reduced so as to increase the net income of the railroad companies, well and good; but I would rather —and I think Congress would rather—accept the enlightened and informed judgment of the Interstate Commerce Commission upon that question than the uninformed judgment of any Senator, however earnest and however studious he may be.

* * * * *

I am not opposing this bill because I do not believe in this form of transportation; I am opposing it because I think it ought to be accomplished through the medium of the Interstate Commerce Commission rather than through direct legislation; and it ought to be

> accomplished, if at all, with due regard to its effect upon the transportation of commodities in which the people are primarily interested; and it ought to be accomplished upon a reasonable and fair basis, for the discrimination has been laid by testimony offered to the commission; and that body alone, so far as the present composition of our Government is concerned, is qualified to determine at what rate mileage books of the kind described in the amendment I have proposed should be issued (p. 1405).

Senator Pomerene (Cong. Rec., vol. 62, pt. 2, p. 1332):

> The objection I have to this legislation is not that I feel that the rates ought not to be reduced, because I think they should be, just as the Senator has been contending. The objection I have is to establishing the precedent of having the Congress of the United States fix rates. What I rose to say was bearing out the Senator's theory that a reduction will increase traffic. I can give the Senator a concrete illustration from my own State.
>
> About 15 or 16 years ago the legislature of Ohio passed what was known as the Feiner law, which reduced passenger rates from 3 cents to 2 cents per mile. It was contended that that legislation would reduce the revenues of the roads. The report of the State railway commissioner for the year following showed that the revenues at a 2 cents per mile rate in that State exceeded what they were the preceding year when the rate was 3 cents.

(c) PROCEEDINGS IN THE HOUSE OF REPRESENTATIVES.

On March 21, 1922, the House Committee conducted its hearing on S. 848, which lasted for nine days and covered very elaborately and fully the whole subject of mileage tickets, historically and otherwise. Witnesses for both the carriers and the traveling public testified.

In June, 1922, Senate Bill 848, as it passed the Senate, was vigorously and fully debated in the House, where it was passed with certain carefully prepared amendments.[2]

Chairman Winslow, in analyzing the bill on the floor of the House, said (Cong. Rec., vol. 62, pt. 9, p. 9714):

> The Senate never intended to express any opinion on the mile price of mileage or on what might have been the original base cost of mileage or to do anything other than to give direction to the Interstate Commerce Commission to issue mileage books under regulations, and so forth. That is all any proponent of the bill asked the Senate to do. The Senate did it promptly and sent the bill to us, and after hearings we came to the conclusion that the bill in its intent might have been all right, but in its form was not sufficiently comprehensive to give the traveling public, whether commercial travelers buying transportation by wholesale or others, a likely chance to buy a mileage book, so called, or a scrip book. We

[2] Appendix B consists of statements of Representatives Winslow, p. 92; Fess, p. 88; Snell, p. 90; Huddleston, p. 90; Hawes, p. 98; Barkley, p. 100; Newton, p. 103; Denison, p. 107; Cooper, p. 110

> cast about to see what we could do for commercial travelers and those who might buy these books. The bill gives the Interstate Commerce Commission all the authority that the Senate provided be given. It gives them more also in two particulars. If you chance to have a copy of the report on this bill you will find a statement is made that the principal changes are twofold. One of the two provisions is made for the issuance of a scrip coupon book. The second is a provision for the exemption of certain rail carriers in case the Interstate Commerce Commission shall see fit to authorize the issuance of a mileage more or less in general, but not universal, as applied to rail carriers. So our attention naturally and automatically came to the consideration of those two forms of books, * * *.

Other members of the House committee spoke at length on the bill (App. B, p. 88). Representative Huddleston, a member of the committee, vigorously opposed the bill (App. B, p. 90).

(d) THE COMMISSION'S REPORT.

The history of the mileage ticket as found by the Commission confirms that it was initiated and used by the carriers to advantage for many years prior to Federal Control.

The Commission found (77 I. C. C. 204; Tr. 23):

> The evidence indicates that mileage tickets were primarily issued not for the purpose of stimulating passenger travel but as a means of inducing shippers to route freight over particular railroads. They were issued at fares

lower than the standard fares for the convenience of and as a concession to shippers at a time when concessions were common. They were not infrequently given to shippers free. At one time it was customary to issue annual passes to large shippers who employed traveling men. Passes were issued with the idea that they would be used by the principal officers of the shipping concern. Mileage tickets were issued chiefly to take care of the traveling men employed by shippers. Moreover, by the use of mileage tickets carriers were able to extend favors to shippers commensurate with their respective freight shipments. That could not be done with term passes as no record was kept of their use.

It later became the custom to use mileage tickets also in exchange for advertising which continued until it was declared unlawful as to interstate commerce. The interstate commerce act and its amendments made it necessary for carriers to revise their practices from time to time. Carriers say that although most of them were convinced long before Federal control that the mileage book should be abolished, it was difficult for them to do so because of competition and because the custom had become deeply rooted by the sanction of time. They stress the fact that the demand of commercial travelers for mileage tickets at rates lower than the standard fares was just as insistent when the standard fare was 2.5 and 2 cents per mile as it is to-day. For some time prior to Federal control efforts were made by carriers to restrict the use of mileage tickets

so that by the time they were taken over by the Government the use of the mileage ticket had become so circumscribed in central passenger association territory, because confined to interstate passage, as to make the sale thereof negligible. Prior to October, 1917, it had been the custom for carriers in southeastern territory to issue a mileage ticket or book good for use by any member of the firm or corporation to whom issued. At that time this form of ticket was substituted for nontransferable tickets which contained 2,000 coupons and were sold at $45.

On June 10, 1918, the director general abolished all mileage books and established in lieu thereof for the convenience of travelers an interchangeable scrip coupon ticket of denominations of $15, $30, and $90, sold at the standard fare, and good on all passenger trains operated by railroads under Federal control. At the expiration of Federal control the carriers continued the use of this form of ticket in the same denominations. This ticket, which is still in use, is interchangeable among practically all carriers by rail except electric and short-line carriers. The revenue from its sale is estimated to represent about 1 per cent of the total passenger revenue. It was originally established by the director general and was perpetuated by the carriers after Federal control, partly to relieve the congestion at ticket offices in the larger cities and partly to take the place of the mileage book and thus afford the public the convenience of boarding trains for short trips without the necessity of purchasing

a ticket at the ticket office for each trip. The commercial travelers insist that the discontinuance of mileage books by the director general was in part to discourage unnecessary travel and to divert some travel from the steam roads to other forms of transportation. To what extent the director general was influenced by a desire to increase passenger revenue is not disclosed.

Immediately prior to the time that mileage tickets were abolished by the director general they had been sold at reductions below the standard fare ranging from 10 to 20 per cent, namely, 10 per cent in New England, 10 per cent in central and trunk-line passenger association territories, 20 per cent in southeastern territory, and $16\frac{2}{3}$ per cent in southwestern territory. At an earlier period they had been sold in some parts of the country at reductions of $33\frac{1}{3}$ per cent.

The evidence with respect to the extent of the use of mileage tickets prior to Federal control tends to indicate that in some parts of the country and at certain periods not less than 20 per cent of the total passenger revenue was derived from the sale of mileage tickets, and that over some routes between particular points the revenue from mileage tickets exceeded 60 per cent of the total revenue derived from passenger traffic between such points. Carriers have never issued an interchangeable mileage ticket good for use on all railroads in all parts of the country. Mileage tickets were issued good for use over particular lines and

were interchangeable as to carriers within defined territories, sometimes including a large number of railroads.

(e) REPRESENTATIONS OF GREAT COMMERCIAL ORGANIZATIONS.

James C. Lincoln, traffic manager of Merchants Association of New York, an organization composed of over 6,000 members, embracing every line of commercial activity in New York City, including real estate, railroads, banking, and other interests, 5,000 of whom are engaged directly or indirectly in commerce, testified as follows (Tr. 154):

> The commercial traveler is a regular and consistent patron of the railroads, and by reason of his vocation—that is, creating commerce, exchange of commodities between the different sections of the country—he is really the agent of the carrier as well as that of the merchant, in creating an interchange of goods between the different sections of the country, from the transportation of which the carrier secures the larger part of its revenues, the freight transportation representing revenues to the carrier that are beyond those of the passenger transportation.
>
> It is our view that the commission should give most earnest consideration to a partial restoration, at least, of the pre-war services and charges by the establishment of an interchangeable mileage book—and, as I say, in using the term "mileage book" I am using it as covering the scrip book.
>
> I have been asked by the Chicago Association of Commerce, its trade commissioner, to

also express their sentiments—they were unable to be present—in favor of the interchangeable mileage book. They state that without question the lower mileage rates will increase travel, as the present cost of keeping men on the road is almost prohibitive, and no unnecessary traveling is being done. They state also that the merchants located in that territory say that their selling staff would be increased if they could reduce this overhead cost of commercial travel.

(f) THE PRIOR REPORTS OF THE COMMISSION REGULATING SUCH AND LIKE FARES.

Mileage fares and tickets:

Kurtz v. *Pennsylvania Co.*, 16 I. C. C. 410; *Weber Club, etc.*, v. *Oregon Short Line*, 17 I. C. C. 212; *Eschner* v. *Pennsylvania R. R. Co.*, 18 I. C. C. 60; *In the matter of the application and use of mileage, excursion, and commutation tickets for through transportation in connection with other lawfully established fares*, 23 I. C. C. 95; *In the matter of practices and regulations governing the issuance, sale, and exchange of mileage books*, 28 I. C. C. 318; *Interchangeable acceptance of 60-trip commutation tickets*, 61 I. C. C. 677; *National Baggage Committee* v. *A., T. & S. F. Ry. Co.*, 32 I. C. C. 152, see page 156; *Proposed increases in New England*, 49 I. C. C. 421.

Commutation fares and tickets:

In the matter of regulations governing sale of commutation tickets to school children, 17 I. C. C. 144; *Boyle* v. *Great Falls & Old Dominion R. R.*, 20 I. C. C. 232; *Moore* v. *New York & Long Branch R. R.*,

20 I. C. C. 557; *Commutation Rate Case*, 21 I. C. C. 428; *Supplemental Report*, 27 I. C. C. 549; *Bitzer* v. *Washington-Virginia Ry.*, 24 I. C. C. 255; *Virginia Highlands Association* v. *Washington-Virginia Ry.*, 30 I. C. C. 592; *Commutation fares to and from Washington, D. C.*, 33 I. C. C. 428; *Mace* v. *Pennsylvania R. R. Co.*, 37 I. C. C. 268; *City of Steubenville* v. *Tri-State Railway*, 38 I. C. C. 281; *New York Commutation Fares*, 42 I. C. C. 354; *Gersch* v. *N. Y., N. H. & H. R. R.*, 50 I. C. C. 486; *City of East Liverpool* v. *S. E. L. & B. V. T. Co.*, 51 I. C. C. 563; *Greater Belleville Board of Trade* v. *E. St. L. & S. Ry. Co.*, 60 I. C. C. 741; *Commuters Club* v. *W., B. & A. E. R. R. Co.*, 61 I. C. C. 302; *Fares of the Washington-Virginia Ry. Co.*, 62 I. C. C. 200; *Ohio Rates, Fares & Charges*, 64 I. C. C. 493.

(g) DECISIONS OF THE COURTS.

In *Interstate Commerce Commission* v. *Baltimore & Ohio R. R.*, 43 Fed. Rep. 37 (Circuit Judge Jackson and District Judge Sage concurring) it was held that "party rate" tickets issued by the carriers at reduced rates did not violate sections 1, 2, and 3. The opinion and judgment in that case were affirmed by this Court in *Interstate Commerce Commission* v. *Baltimore & Ohio R. R.*, 145 U. S. 263. (See Point VIII.)

IV.

THE PROCEEDINGS BEFORE THE COMMISSION.

The amendment was approved on August 18, 1922, and five days later, August 23, 1922, the Commission entered its order fixing September 26, 1922, as the

date for hearing before Commissioner Meyer at Washington. (Tr. 16.) Accordingly notice was served with a list of questions upon which testimony would be received. All carriers by rail subject to the act were made respondents to the proceeding with further notice that each carrier seeking exemption should file a written statement on or before September 15, 1922, showing the grounds therefor.

On November 15, 1922, the case was submitted. On January 26, 1923, the Commission filed its first report (Tr. 19), written by Commissioner Meyer, with whom concurred Commissioners McChord, Aitchison, Campbell, Lewis, Esch, and Cox; dissenting, Commissioners Hall and Potter (concurring), Daniels and Eastman. The Commission fixed March 15, 1923, as the date for the carriers to establish, issue, and maintain "a nontransferable, interchangeable scrip coupon ticket in the denomination of $90, which shall be sold at a reduction of 20 per cent from the face value of the ticket. We further find that the rates resulting from that reduction will be just and reasonable for this class of travel." (Tr. 28.)

Action on the rules and regulations to govern the issuance of the ticket was deferred for 30 days from the service of the report that the parties might endeavor to agree upon a set of rules and regulations.

On February 23, 1923, after further hearing, the case was submitted on the subject of rules and regulations. On March 6, 1923, the supplemental report (Tr. 44), of the Commission was filed (Commis-

sioners Hall, Daniels, and Potter dissenting) together with a full and complete set of rules and regulations (Tr. 47). On the same day the final order of the Commission was accordingly entered (Tr. 54).

There is no allegation or charge directly or indirectly that all of the parties were not accorded the full hearing provided by the statute or that the proceedings before the Commission were not in all respects regular.

V.

THE PETITION.

The New York Central Railroad Company and forty-seven other common carriers by railroad filed a joint bill to annul and enjoin the order of the Commission as not within its statutory power, or, if it is, to adjudge the amendment of August 18, 1922, as unconstitutional. The appearances before, and the report of, the Commission disclose that the subject matter of the amendment was considered as applicable to all the carriers of all of the several rate groups (Tr. 19). The testimony before the Commission was taken that way; the order was so entered. The petition is along the same lines. No carrier has made any attack in a separate suit against the order. Apparently the carriers have agreed to stand or fall united.

The main charges are that the order is not supported by the Commission's findings (Par. X); that it requires the carriers to perform services at rates which are not compensatory (Par. XI); that it provides for a special rate or rebate whereby the carrier is to

collect and receive from one person a less and different compensation for a similar service than from other persons (Par. XII); that it requires the carriers to violate section 3 and to give undue or unreasonable preference to the holder of a scrip coupon ticket over the holder of a standard fare ticket on the ordinary trains (Par. XIII); that the order was based on the mistaken view that the amendment required the issuances of the tickets at a reduced rate regardless of the evidence which might be adduced at the hearing (Par. XIV); if the amendment did authorize a reduced rate then it is unconstitutional as an arbitrary discrimination which takes property without due process of law (Par. XV); the petitioners are required, without regard to consequences, to try for a period of at least one year an experiment for the purpose of determining whether or not the fare would be reasonable (Par. XVI); the order is void in that pursuant to Section 15–a and other orders of the Commission *estimated reductions* on account of the scrip coupon ticket will not conform to the requirement of the act that the carriers should earn an aggregate annual net railway operating income equal as nearly as may be to 5.75 per cent (Par. XVII); it is void under Section 1 of the act because a just and reasonable fare for the holder of a scrip coupon ticket can not possibly be less than a just and reasonable fare for the transportation of any other passenger receiving the same service (Par. XVIII); the order interferes with the liberty of contract (Par. XIX); the order is void because it requires one carrier to

accept scrip coupon tickets issued by itself or another carrier in payment for a single journey irrespective of the length (Par. XX); the amendment prescribed no rule or standard to guide the discretion of the Commission and its exemption of certain carriers was arbitrary (Par. XXI); the order is not restricted to interstate commerce but applies to intrastate commerce (Par. XXII); the order, if allowed to go into effect, will result in irreparable injury, as petitioners may not recover uncollected amounts in case the amendment ultimately should be declared void. (Tr. 13.)

The main charge is that the order is void on its face.

VI.

THE ALLEGED UNREASONABLENESS OF THE REDUCED RATE.

Similar charges have already been exploded in the *New England Divisions Case*, 261 U. S. 184. The theory of the petition is (Par. IX, Tr. 5) that by its order in *Ex parte 74, Increased Rates, 1920*, 58 I. C. C. 220, the Commission, under Section 15-a, had established as just and reasonable for the transportation of passengers the rate of 3.6 cents per mile "which rate of fare accordingly became the established just and reasonable rate for this service." It is further charged that in *Reduced Rates, 1922*, 68 I. C. C. 676, the Commission reaffirmed that finding. It is then charged that the issuance of the scrip coupon tickets at a reduction of 20 per cent required the companies to carry over their lines passengers at a rate of 2.88

cents per mile, irrespective of the Commission's previous finding. (Tr. 6.) Again, it is alleged (Par. XVII, Tr. 10) that in *Ex parte 74, Increased Rates, 1920*, 58 I. C. C. 220, under Section 15–a, the Commission divided the railroads into four groups and fixed the tentative valuation of the Eastern Group at $8,800,000,000, and in *Reduced Rates, 1922*, 68 I. C. C. 676, the rate of return at 5.75 per cent reaffirmed the previous valuation; it is further alleged that the passenger revenues of appellees for the year ended December 31, 1922, were approximately $480,000,000 and that the issuance and use of the coupon tickets will result in a loss of 6 per cent, or approximately $28,800,000, on the net railway operating income without any substantial increase in the volume of transportation (Tr. 11); this, it is said, is beyond the power of the Commission, in that it requires a reduction at a time when the carriers are not earning the rate of return prescribed on the valuation established by the Commission. Argumentative deductions are similarly drawn with respect to other effects of the order.

All of these allegations and arguments appear to rest on the insecure foundation that because the Commission increased rates in 1914, *The Five Per Cent Case*, 31 I. C. C. 351; 32 I. C. C. 325; fifteen per cent in 1917, *The Fifteen Per Cent Case*, 45 I. C. C. 303; twenty-five per cent in 1918, General Order of Director General, No. 28; and forty per cent (twenty per cent in passenger fares) in 1920 in *Ex parte 74*, 58 I. C. C. 220, all of which were found just

and reasonable (see also *Reduced Rates, 1922,* 68 I. C. C 676), that any reduced rates, in whatever form, must necessarily, *ipso facto,* be unreasonable, confiscatory, and void.

It is a new theory that the power of Congress and the Commission is limited to rate regulation in the sense that the rate must be made final in the outset. From the beginning a rate fixed by the Commission or otherwise has been expressly made subject to recovery after payment by the shipper when shown to be excessive. Reparation in large sums has frequently been awarded by the Commission and recovered through the courts. *Spiller* v. *Atchison, Topeka & Santa Fe Railway Co.,* 253 U. S. 117; *Mills* v. *Lehigh Valley Railroad Co.,* 238 U. S. 473, 481; *Meeker & Co.* v. *Lehigh Valley R. R. Co.,* 236 U. S. 412, 430, 431; *United States of America* v. *Director General, as Agent, et al,* 80 I. C. C. 143.

Title IV of the Transportation Act of 1920 is now a part of the Act to Regulate Commerce as amended and preceded the amendment of August 18, 1922. Considering the act as a whole, the amendment should be construed in the light of Title IV of the Transportation Act. Title IV was a part of the Interstate Commerce Act when the Commission entered its orders in *Increased Rates 1920,* and *Reduced Rates, 1922.* (*Railroad Commission of Wisconsin* v. *C., B. & Q. R. R. Co.,* 257 U. S. 563; *State of New York* v. *United States,* 257 U. S. 591; *Lehigh Valley Railroad Co.* v. *Public Service Commission,* 272 Fed. Rep. 758, 767; *City of New York* v. *United States,* 272 Fed.

Rep. 768; *New England Divisions Case,* 282 Fed. Rep. 306; affirmed, *New England Divisions Case,* 261 U. S. 184.) In all of these cases many of the petitioners in the instant case stood with the Government in the several courts to argue for the power of Congress and the Commission to sustain the orders which brought the enormous revenues to these carriers. Now, when the scale swings back more nearly to an even balance, we are told that any reduction is confiscatory and that the entire railroad structure in the Eastern Rate Group is imperiled.

In *New England Divisions Case, supra,* in sustaining the order this Court, speaking through Mr. Justice Brandeis, said (pp. 196, 197):

> * * * *The order entered in Ex parte 74 was at all times subject to change.* [Italics ours.]
>
> * * * * *
>
> Obviously, Congress intended that a method should be pursued by which the task, which it imposed upon the Commission, could be performed. The number of carriers which might be affected by an order of the Commission, if the power granted were to be exercised fully, might far exceed six hundred; the number of rates involved, many millions. The weak roads were many. The need to be met was urgent. To require specific evidence and separate adjudication, in respect to each division of each rate of each carrier, would be tantamount to denying the possibility of granting relief. We must assume that Congress knew this; and that it knew also that

the Commission had been confronted with similar situations in the past and how it had dealt with them.

For many years before the enactment of Transportation Act, 1920, it had been necessary, from time to time, to adjudicate comprehensively upon substantially all rates in a large territory. When such rate changes were applied for, the Commission made them by a single order; and, in large part, on evidence deemed typical of the whole rate structure. This remained a common practice after the burden of proof to show that a proposed increase of any rate was reasonable had been declared, by Act of June 18, 1910, c. 309, Sec. 12, 36 Stat. 539, 551, 552, to be upon the carrier. Thus, the practice did not have its origin in the group system of rate making provided for in 1920 by the new Section 15a. It was the actual necessities of procedure and administration which had led to the adoption of that method, in passing upon the reasonableness of proposed rate increases. The necessity of adopting a similar course when multitudes of divisions were to be passed upon was obvious. The method was equally appropriate in such enquiries; and we must assume that Congress intended to confer upon the Commission power to pursue it.

That there is no constitutional obstacle to the adoption of the method pursued is clear. Congress may, consistently with the due process clause, create rebuttable presumptions, *Mobile, Jackson and Kansas City R. R. Co.* v. *Turnipseed*, 219 U. S. 35; *Lindsley* v.

Natural Carbonic Gas Co., 220 U. S. 61; and shift the burden of proof, *Minneapolis & St. Louis R. R. Co.* v. *Railroad and Warehouse Commission*, 193 U. S. 53. It might, therefore, have declared in terms that if the Commission finds that evidence introduced is typical of traffic and operating conditions and of the joint rates and divisions of the carriers of a group, it may be accepted as *prima facie* evidence bearing upon the proper divisions of each joint rate of every carrier in that group. Congress did so provide, in effect, when it imposed upon the Commission the duty of determining the divisions. For only in that way could the task be performed. As pointed out in *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 579, serious injustice to any carrier could be avoided, by availing of the saving clause which allows anyone to except itself from the order, in whole or in part, on proper showing.

The allegations with respect to the unreasonableness of the reduced rate rest on the same conditions as the allegations of confiscation. That the reasonableness of a rate when based on substantial evidence is a question of fact has long since been settled and has very recently been repronounced. Nor will the court consider the weight of the evidence or the wisdom of the order.

The Baltimore & Ohio Railroad Company, which appeared separately as a party petitioner (Tr. 79), in its brief of 30 years ago in *Interstate Commerce Com-*

mission v. *Baltimore & Ohio* (post, 40), by its counsel, successfully argued to this Court as follows:

> (Brief in 145 U. S. 263, p. 44): We have already pointed out that the term "reasonable" is one of those indefinite terms found in our common law, which refer for their meaning to that innate reason and sense of justice which are supposed to be attributes of the human mind. We have pointed out that the term is incapable of exact definition apart from the facts of the particular case. We meet now the question by what general considerations is a judge to be guided in seeking to ascertain whether the prices fixed by a carrier for its services are "reasonable."
>
> Clearly, if it be possible to show that the rates in question have appealed to the minds of a great number of men as "reasonable," that they have acquiesced in them and acted upon them, such evidence is the best of which the matter is capable. In the face of such evidence all *a priori* theories, even of the judge's own mind, must yield to the consensus of the minds of other men. Now, the evidence we can offer in support of the reasonableness of rates made on the basis of the value of service sold is the consensus of the whole commercial world, including as well the purchasers as the sellers of railroad transportation. Not only have those engaged in commercial pursuits acquiesced in the making of rates on that basis, and made their investments accordingly, but the Courts and the Bar also have likewise ac-

> quiesced; and now, after more than a half century of practice based upon that method of fixing rates, the method itself has become one of the laws of commerce in this country beyond the control of the carriers or the purchasers of transportation. Therefore, we say, this law of commerce has become a part of the definition of the term "reasonable rates." There is no longer room for theories of "exact equality," so called, because the basing of rates on the value of service sold necessarily makes inequalities, if "equality" be determined by the "amount and quality of service."

Mr. Victor Morawetz, a well-known authority on the subject, on April 18, 1905, before the Senate Committee on Interstate Commerce, said:

> There is a wide range between a rate that is unreasonably high, and therefore illegal as against the shipper, and a rate that is so low as to be confiscatory as against the carrier; for example: Assuming that a railway company may charge 40 cents a hundred pounds for carrying a given article between two points without making the rate unreasonably high and therefore illegal, it is quite possible that this rate might be reduced by legislative action to, say, 30 cents a hundred pounds without violating any constitutional right of the carrier. In this case the maximum rate which would be reasonable and which could be imposed by the carrier upon the shipper would be 40 cents a hundred pounds, and the minimum rate which could be imposed by the legislature on the railway company would be 30 cents a

> hundred pounds. * * * It is rarely, if ever, true that there is but one just and reasonable rate for the transportation of a given article between two points. In nearly every instance there is a wide range within which any rate would be just and reasonable, and it is wholly a question of business policy at what point the rate shall be fixed within that range.
>
> The expressions "reasonable rates" and "unreasonable rates" are often used in very different senses. Thus, when it is said that a rate shall be reasonable, this may mean (1) that the rate shall not be unreasonably high and illegal under the common law and the interstate commerce act, or (2) that the rate shall not be unreasonably low in the sense of being confiscatory, or (3) that the rate shall be the particular rate which, in the opinion of a commission or of some particular person, ought to be established between these two extremes. * * * (Hearings, Senate Com., vol. 2, 1904, 1905, 795, 796.)

In an article in the Yale Law Journal, January, 1923, entitled "The Recapture of Earnings Provisions of the Transportation Act," Mr. Charles W. Bunn says (pp. 219, 220):

> But before either contention can be examined it is fundamentally necessary to define terms and not to use the expression "reasonable rate" in a double sense. Where a court is called upon to determine what is a reasonable charge either for property or service the question is very different from that presented

when the inquiry is whether a rate fixed by legislative authority takes property without due process. Here we have no concern with the general question of *quantum meruit*. The inquiry, it should clearly be perceived, is whether the legislation takes property without compensation.

Cotting v. *Kansas City Stockyards Co.*, 183 U. S. 79, 95, and *Canada Southern Ry.* v *International Bridge Co.*, 8 A. C. 723, are frequently cited to prove that the reasonable charge of a carrier involves only the value of the service it renders; and that a carrier so favorably situated as to be able to render a multitude of services and make abnormal profits is still entitled to have its profits disregarded; is entitled, in other words, to the same charge per service as a carrier which has few transactions, such charges not becoming unreasonable because, by reason of their multitude, the aggregate of profits is large. This may be good doctrine where the court is considering only the value of services on the general principles of *quantum meruit*. But, put as a constitutional limitation on legislative power and applied to cases where the court is considering whether legislative rates operate to take property without compensation, it is not consistent with the authorities.

No fallacy is more dangerous than the use of a term in different senses. When it is said that a carrier is entitled to a reasonable rate for service rendered, and therefore that what one carrier receives for a given service

is a conclusive measure of what every other carrier must receive, we are using the term "reasonable rate" in the sense of *Canada Southern Ry.* v. *International Bridge Co.*, 20 I. C. C. 243, 274. Whilst on the other hand the question here is not a determination on general principles of what are reasonable rates (for the Constitution nowhere guarantees reasonable rates in that sense), but whether rates fixed by legislative authority on the plan of the act will be held confiscatory by the courts and whether the recapture of earnings provided by the act is the taking of private property without compensation.

One who says that Congress can not in the same breath adjudge as just and reasonable the rates charged by a carrier and take away some part of the earnings derived from such "reasonable rates" is playing upon the meaning of a word, using "reasonable" in two senses. The plain fact is that under the act the Commission does not fix "just and reasonable" rates for any particular carrier. It is required to fix what are just and reasonable rates for a group of carriers; rates fair for the average of the group. It says what are just and reasonable rates for a group of carriers to receive and for their shippers and passengers to pay. Its determination that any scheme of rates is just and reasonable is nothing more than the tentative determination provided for by the act.

Let us consider on the authorities the constitutional right of any carrier to object in the courts to rates fixed by legislative authority.

> * * * The rates fixed as provided in the act are tentative only and if any carrier's earnings are afterwards recaptured and its property and revenue left exactly where they would have been had rates been fixed originally to yield the same amount, it can make no difference to the carrier whether this result is reached by rates directly fixed for it or by higher rates fixed tentatively for a group, subject to readjustment through recapture.

As already pointed out, the allegations with respect to the unreasonableness of the rates are not only general but they are made jointly by all of the carriers located and operating in the Eastern Rate Group.

VII.

THE COMMISSION HAD THE RIGHT TO LOOK TO "THE SPIRIT AND APPARENT THEORY OF THE LAW," AND THE DISTRICT COURT ERRED IN HOLDING THAT IT RESTED ITS ORDER ON THAT ALONE.

The appellees claim that the Commission ignored its own finding of facts which would not sustain any reduction, and then ordered a reduction of 20 per cent because in that way only could the spirit and theory of the law be carried out. As already observed, the petition does not assail the order for lack of evidence but as contrary to the findings; nor did the District Court hold there was no evidence.

Passing the question whether the issuance of the scrip books at *increased* rates or even at *standard* rates would or would not have made the amendment

effective, the Congressional intent has been an elementary rule of judicial statutory construction since the foundation of the Government. There is no such grave inconsistency in the finding that "the record warrants the view that a coupon ticket at a reasonably reduced fare should be established" (Tr. 28) under the mandate of the statute, and that such was "the spirit and apparent theory of the law," as to convict the Commission of the charge of overreaching completely its powers.

Atlantic Coast Line v. *Burnette*, 239 U. S. 199, 201, Mr. Justice Holmes:

> In dealing with the enactments of a paramount authority, such as Congress is, within its sphere, over the States, we are not to be curious in nomenclature if Congress has made its will plain, nor to allow substantive rights to be impaired under the name of procedure. *Central Vermont Railway* v. *White*, 238 U. S. 507, 511.

Williams v. *United States Fidelity Co.*, 236 U. S. 549, 554, Mr. Justice McReynolds:

> It is the purpose of the Bankrupt Act to convert the assets of the bankrupt into cash for distribution among creditors and then to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes. *Wetmore* v. *Markoe*, 196 U. S. 68, 77; *Zavelo* v. *Reeves*, 227 U. S. 625, 629; *Burlingham* v. *Crouse*, 228 U. S. 459, 473.

> And nothing is better settled than that statutes should be sensibly construed, with a view to effectuating the legislative intent. *Lau Ow Bew* v. *United States*, 144 U. S. 47, 59; *In re Chapman*, 166 U. S. 661, 667.

United States v. *Farenholt*, 206 U. S. 226, 229, Mr. Justice McKenna:

> A court is not always confined to the written word. Construction sometimes is to be exercised as well as interpretation. And "construction is the drawing of conclusions respecting subjects that lie beyond the direct expression of the text from elements known from and given in the text—conclusions which are in spirit though not within the letter of the text." Lieber, 56.

McDougal v. *McKay*, 237 U. S. 372, 385, Mr. Justice McReynolds:

> * * * but these rules must be accommodated to the facts and the great purpose of Congress effectuated as nearly as may be.

Porto Rico Railway v. *Mor*, 253 U. S. 345, 348, Mr. Justice Brandeis:

> Furthermore, special reasons exist for so construing the clause in question. The act manifests a general purpose to greatly curtail the jurisdiction of the District Court. If the application of the clause were doubtful, we should so construe the provision as to effectuate the general purpose of Congress. *American Security & Trust Co.* v. *District of Columbia*, 224 U. S. 491; *Inter-Island Steam Navigation Co.* v. *Ward*, 242 U. S. 1.

Eastern Extension v. *United States*, 231 U. S. 326, 333, Mr. Justice Hughes:

> The words "treaty stipulation" should not be so narrowly interpreted as to permit the exercise of jurisdiction where the claim arises solely out of the treaty cession. Whether the liability asserted is said to result from an express provision of assumption contained in a treaty or is sought to be enforced as a necessary consequence of the cession made by a treaty it is equally within the policy and spirit of the statute; and the letter of the statute should not be otherwise construed.

Interstate Drainage v. *Board Commissioners*, 158 Fed. Rep. 270, 273 (C. C. A.), District Judge Philips:

> The essential object of judicial construction of a statute is to discover the legislative mind in enacting it. The first step in the analysis is to perceive from the face of the whole act what was the underlying purpose. "The intention of a legislative act may often be gathered from a view of the whole and every part of a statute taken and compared together. When the true intention is accurately ascertained, it will always prevail over the literal sense of the terms. The occasion and necessity of the law, the mischief felt, and the object and remedy in view are to be considered. When the expression in a statute is special or particular, but the reason general, the special shall be deemed general, and the reason and intention of the law-giver will control the strict letter of the law when the latter would lead to palpable injustice, contradic-

tion, and absurdity. * * * A thing within the intention of the Legislature in framing a statute is sometimes as much within the statute as if it were within the letter." In the Matter of Bomino's Estate, 83 Mo., loc. cit. 441.

VIII.

THE ACT OF CONGRESS AND THE ORDER OF THE COMMISSION CREATE NO NEW PRINCIPLE UNFAMILIAR TO EITHER CARRIERS OR PASSENGERS IN TRANSPORTATION.

Section 22 has been in the Act since it was approved February 4, 1887, without substantial amendment, until the present, except to add to the classes who might receive, at the discretion of the carriers, free or reduced rate transportation. Thus, the early act provided "That nothing in this act shall prevent * * * the issuance of mileage, excursion, or commutation passenger tickets." Such tickets are as old as railroad transportation.

The court will take judicial notice that during the working days practically the major portion of the entire down-town population of the great cities of New York and Chicago are transported in and out, morning and evening, on the commutation fares and by the suburban service of the railroad companies. When interstate, such fares are regulated by the Commission. *Commutation Rate Case*, 27 I. C. C. 549.

The right of the carrier to issue party-rate tickets was sustained by this court in a case commenced very shortly, if not immediately, after the first act to regulate commerce was approved.

In *Interstate Commerce Commission* v. *Baltimore & Ohio*,* 145 U. S. 263, 276, this Court, speaking through Mr. Justice Brown, sustained the right of the carrier to issue a "party-rate ticket" for the interstate transportation of ten or more persons at a lower rate than that charged to a single individual for a like transportation on the same trip, and held that the higher rate was not "an unjust and unreasonable charge" under Section 1, nor an "unjust discrimination" under Section 2, nor an "undue or unreasonable preference or advantage" within the meaning of Section 3. While reference is made to Section 22, it does not appear that the opinion was rested on that section. The Court said (277, 278, 279, 281, 284):

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* The Baltimore & Ohio Railroad Company was not a party to the original petition in the District Court, filed March 30, 1923 (Tr. 2). Subsequently, on April 13, 1923, the date of the hearing (Tr. 79), that company, by its counsel, was made a party petitioner by an order of the Court. The records of this Court in the case of *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad Company*, 145 U. S. 263, contain the brief of counsel for the company in that case. It is noteworthy that the Baltimore & Ohio made identically the same arguments in support of the "party rate" tickets that the Government is now making for the nontransferable interchangeable coupons. Further extracts from the brief of the Baltimore & Ohio Company in that case follow. (See ante, 30.)

JAMES L. TAYLOR, GENERAL PASSENGER AGENT, testified: (Br. 13): A. There is, to a certain extent, a great similarity in the principles that govern the concessions in the several instances. It may be said that in the South particularly our trains have to run between fixed points anyhow, and that there are certain charges and expenses in connection with them that are very little affected by the volume of traffic. Therefore, the more we can increase the traffic of the several characters, the more we believe we increase our profit in the running of those trains. I suppose that that may be said to be a general principle. We desire to increase the traffic over and above what may be said to be fixed or constant traffic, which we believe we would get anyway. We think that what we may get in the shape of this additional traffic may be due very largely to the encouragement which we can afford to give it by special rates, etc.

The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations, or localities; to inhibit

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ARGUMENT OF COUNSEL (Br. 14): The Commission state that their rule of equality by which all passengers riding in the same car from the same starting point to the same destination must each pay the same fare, is no new idea in law, but has always been recognized as a sound proposition of law. If this statement be true, then the issuance of excursion, mileage, and commutation passenger tickets has been legalized for the first time by the Act to Regulate Commerce. That Act applies only to interstate commerce. Therefore, every such ticket issued between points within the same State is to-day illegal. When we find that every railroad company issues such tickets; that in no State is there a reported case, in State or Federal Court, wherein the legality of such tickets has even been questioned; that there is no such case in England—when we find this universal practice acquiesced in universally by the people and the Courts, we can not but believe that the Commission are mistaken. What is common law? By whom has this "idea in law" been recognized as a sound legal proposition?

ARGUMENT OF COUNSEL (Br. 26): The 22d section provides that "nothing in this Act shall prevent," among other things, "the issuance of mileage, excursion, or commutation passenger tickets." The plaintiff's testimony in this case is taken to prove that the so-called "party ticket" was not, in railroad parlance, called or known as a "mileage," "excursion," or "commutation" ticket at the date of the Act's passage. The theory of the Commission is that this provision of the 22d section creates an exception from the rules of the 2d and 3d sections, in favor of certain *forms of ticket*, and that *no form of ticket* not then in use, and known as a mileage, excursion, or commutation ticket, in the vernacular of railroad ticket offices, can be included in the exception. On the other hand, the defendant's theory is that this provision of the 22d section recognizes the business principle in pursuance of which the *forms of ticket* named have been issued, and that it amounts to a legislative construction of the 2d and 3d sections as not forbidding the application of that principle in making passenger rates.

All the witnesses agree that the same business principle induces the making of the reduced rate for party tickets that induces the making of reduced rates on tickets admitted to be commutation tickets. We think the testimony of the plaintiff's own witnesses shows that no meaning can be given the words "commutation passenger tickets," which does not include all tickets issued on the same principle.

greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights. It was not designed, however, to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage where such reduction did not operate as an unjust discrimination against other persons traveling over the road. In other words, it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail. It is not all discriminations or preferences that fall within the inhibition of the statute. * * *

The question involved in this case is, whether the principle above stated as applicable to two individuals applies to the purchase of a single ticket covering the transportation of ten or more persons from one place to another. These are technically known as party-rate tickets, and are issued principally to theatrical and operatic companies for the transportation of their troupes. Such ticket is clearly neither a "mileage" nor an "excursion" ticket within the exception of section 22; and upon the testimony in this case it may be doubtful whether it falls within the definition of "commutation tickets," as those words are commonly understood among railway officials. The words "commutation ticket" seem to have no definite meaning. * * * The party-rate ticket upon the defendant's road is a single ticket issued to a party of ten or more, at a fixed rate of two cents per mile,

or a discount of one-third from the regular passenger rate. * * *

The testimony indicates that for many years before the passage of the act it was customary for railroads to issue tickets at reduced rates to passengers making frequent trips, trips for long distances, and trips in parties of ten or more, lower than the regular single fare charged between the same points; and such lower rates were universally made at the date of the passage of the act. As stated in the answer, to meet the needs of the commercial traveler the thousand-mile ticket was issued; to meet the needs of the suburban resident or frequent traveler, several forms of tickets were issued. For example, monthly or quarterly tickets, good for any number of trips within the specified time; and ten, twenty-five, or fifty trip tickets, good for a specified number of trips by one person, or for one trip by a specified number of persons; to accommodate parties of ten or more, a single ticket, one way or round trip, for the whole party, was made up by the agent on a skeleton form furnished for the purpose; to accommodate excursionists traveling in parties too large to use a single ticket, special individual tickets were issued to each person. Tickets good for a specified number of trips were also issued between cities where travel was frequent. *In short, it was an established principle of the business that whenever the amount of travel more than made up to the carrier for the reduction of the charge per capita, then such reduction*

was reasonable and just in the interests both of the carrier and of the public. Although the fact that railroads had long been in the habit of issuing these tickets would be by no means conclusive evidence that they were legal, since the main purpose of the act was to put an end to certain abuses which had crept into the management of railroads, yet Congress may be presumed to have had those practices in view, and not to have designed to interfere with them, except so far as they were unreasonable in themselves or unjust to others. *These tickets then being within the commutation principle of allowing reduced rates in consideration of increased mileage, the real question is, whether this operates as an undue or unreasonable preference or advantage to this particular description of traffic, or an unjust discrimination against others.* * * * The evidence shows that the amount of business done by means of these party-rate tickets is very large; that theatrical and operatic companies base their calculation of profits to a certain extent upon the reduced rates allowed by railroads; and that the attendance at conventions, political and religious, social and scientific, is, in a great measure, determined by the ability of the delegates to go and come at a reduced charge. If these tickets were withdrawn, the defendant road would lose a large amount of travel, and the single-trip passenger would gain absolutely nothing. *If a case were presented where a railroad refused an application for a party-rate ticket upon the ground that it was not intended for the use of the general*

> *public, but solely for theatrical troupes, there would be much greater reason for holding that the latter were favored with an undue preference or advantage.* * * *
>
> There is nothing in the objection that party-rate tickets afford facilities for speculation and that they would be used by ticket brokers or "scalpers" for the purpose of evading the law. The party-rate ticket, as it appears in this case, is a single ticket covering the transportation of ten or more persons, and would be much less available in the hands of a ticket broker than an ordinary single ticket, since it could only be disposed of to a person who would be willing to pay two-thirds of the regular fare for that number of people. It is possible to conceive that party-rate tickets may, by a reduction of the number for whom they may be issued, be made the pretext for evading the law and for the purpose of cutting rates, but should such be the case, the courts would have no difficulty in discovering the purpose for which they were issued and applying the proper remedy. (Italics ours.)

In *Lake Shore & Michigan Southern* v. *Smith*, 173 U. S. 684, 691, on which appellees will doubtless rely, this Court held that, after the minimum rate for passengers had been established by the State, the act of the Legislature of Michigan providing that one-thousand-mile nontransferable tickets shall be kept for sale at reduced rates at the principal ticket offices of all railroad companies was a taking of the

company's property without due process of law. In delivering the opinion Mr. Justice Peckham [1] said:

> And it (the act) assumes to regulate the time in which the tickets purchased shall be valid and to lengthen it to double the period the railroad company has ever before provided. It thus invades the general right of a company to conduct and manage its own affairs, and compels it to give the use of its property for less than the general rate to those who come within the provisions of the statute, and to that extent it would seem that the statute takes the property of the company without due process of law.

In *Pennsylvania Railroad* v. *Towers*, 245 U. S. 6, 9, this Court said that the "plaintiff in error relies upon and quotes largely from the opinion of this Court in the *Lake Shore & Michigan Southern* v. *Smith*, 173 U. S. 684." With respect to the *Lake Shore Case*, this Court held that (p. 10) it "did not involve, as does the present one, the power of a State commission to fix intrastate rates for commutation tickets *where such rates had already been put in force by the railroad company of its own volition*," and (p. 17) "True it is that it may not be possible to reconcile these views with all that is said in the opinion delivered for the majority of the court in the case of *Lake Shore & Michigan Southern Railway Co.* v. *Smith, supra*. The views therein expressed, which are inconsistent with

[1] Concurring, Mr. Justice Harlan, Mr. Justice Brewer, Mr. Justice Brown, Mr. Justice Shiras, Mr. Justice White; dissenting, Mr. Chief Justice Fuller, Mr. Justice Gray, and Mr. Justice McKenna.

the right of the States to fix reasonable commutation fares when the carrier has itself established fares for such service, *must be regarded as overruled by the decision in this case.*"

Citing with approval *Interstate Commerce Commission* v. *Baltimore & Ohio, supra,* this Court, speaking through Mr. Justice Day,[1] said (p. 11):

> Having the conceded authority to regulate intrastate rates, we perceive no reason why such power may not be exercised through duly authorized commissions and rates fixed with reference to the particular character of the service to be rendered.
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> In *Norfolk & Western Ry. Co.* v. *West Virginia*, 236 U. S. 605, 608, after making reference to *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, this court said:
>
> "It was recognized (in the *North Dakota case*) that the State has a broad field for the exercise of its discretion in prescribing reasonable rates for common carriers within its jurisdiction; that it is not necessary that there should be uniform rates or the same percentage of profit on every sort of business; and that there is abundant room for reasonable classification and the adaptation of rates to various groups of services."
>
> That the State may fix maximum rates governing one-way passenger travel is conceded. Having the general authority to fix rates of a reasonable nature, we can see no good reason

[1] Concurring, Mr. Justice Holmes, Mr. Justice Van Devanter, Mr. Justice Pitney, Mr. Justice Brandeis, and Mr. Justice Clarke; dissenting, Mr. Chief Justice White, Mr. Justice McKenna, and Mr. Justice McReynolds.

for denying to the State the power to exercise this authority in such manner as to fix rates for special services different from those charged for the general service. In our opinion the rate for a single fare for passengers generally may be varied so as to fit the particular and different service which involves, as do commutation rates, the disposition of tickets to passengers who have a peculiar relation to the service. The service rendered in selling a ticket for one continuous trip is quite different from that involved in disposing of commutation tickets where a single ticket may cover 100 rides or more within a limited period. The labor and cost of making such tickets as well as the cost of selling them is less than is involved in making and selling single tickets for single journeys to one-way passengers.

The service rendered the commuter, carrying little baggage and riding many times on a single ticket for short distances, is of a special character and differs from that given the single-way passenger.

It is well known that there have grown up near to all the large cities of this country suburban communities which require this peculiar service, and as to which the railroads have themselves, as in this instance, established commutation rates. After such recognition of the property and necessity of such service, we see no reason why a State may not regulate the matter, keeping within the limitation of reasonableness.

On the strength of these commutation tariffs, it is a fact of public history that thou-

> sands of persons have acquired homes in city suburbs and near-by towns in reliance upon this action of the carriers in fixing special rates and furnishing particular accommodations suitable to the traffic. This fact has been recognized by the courts of the country, by the Interstate Commerce Commission, and quite generally by the railroad commissions of the States.

In *Intermountain Rate Cases*, 234 U. S. 476, the order of the Commission was alleged to be of momentous consequence. The order was entered under section 4 of the Act to Regulate Commerce, as amended, which established the "hard and fast" long and short haul clause, relief from which could be obtained only by the application to the Commission on a proper showing.

As in the instant case, the order was assailed, *first*, as beyond the power of the Commission; and, *second*, if within its power then section 4, as amended, was void.

Sustaining in all respects the validity of section 4, as amended, and the power of the Commission exercised thereunder, this Court, speaking through Mr. Chief Justice White, said (234 U. S. 485, 494):

> * * * *it follows that in substance the amendment intrinsically states no new rule or principle but simply shifts the powers conferred by the section as it originally stood; that is, it takes from the carriers the deposit of public power previously lodged in them and vests it in the commission as a primary instead of a reviewing function. In other words, the*

elements of judgment or, so to speak, the system of law by which judgment is to be controlled, remains unchanged but a different tribunal is created for the enforcement of the existing law.

* * * * *

As will be seen by the order and as we have already said for the purpose of the percentages established zones of influence were adopted and the percentages fixed as to such zones varied or fluctuated upon the basis of the influence of the competition in the designated areas. *As we have pointed out, though somewhat modified, the zones as thus selected by the Commission were in substance the same as those previously fixed by the carriers as the basis of the rate making which was included in the tariffs which were under investigation and therefore we may put that subject out of view.* (Italics ours.)

The Congress merely enacted into the statute a principle long since practiced by the carriers. That the carriers themselves issued *mileage*, excursion and commutation passenger tickets must not only be admitted but the Commission has made a full finding of facts on the subject. Power hitherto reposed in the carriers was by the statute merely transferred to and reposed in the Commission. Such has been the basis of practically all legislation concerning the carriers, and in the amendment of August 18, 1922, there was no departure in substance, and little in form, from previously existing practices. Appellees make no allegation that the amendment introduced a new and unusual departure from existing transportation conditions.

IX.

THE TEMPORARY NATURE OF THE ORDER IN THAT IT MAY UNDERGO A REVISION AFTER A ONE-YEAR TEST IS IN FAVOR OF THE CARRIERS RATHER THAN AGAINST THEM.

The petition charges that the order is void because "the petitioners are required * * * to try for a period of at least one year an experiment for the purpose of determining whether or not the reduction in fare prescribed by the Commission would be reasonable" (Tr. 9).

It is not unusual for courts to hold that a claim of confiscation may not be made in advance of a practical test of an administrative order.

In the *New England Divisions Case* the order was known as *provisional*. In the instant case the order is referred to as an *experiment*. The difference in name is probably the only difference between the two. In delivering the opinion Mr. Justice Brandeis said: (p. 201).

> A hearing may be a full one, although the evidence introduced does not enable the tribunal to dispose of the issues completely or permanently; and although the tribunal is convinced, when entering the order thereon, that, upon further investigation, some changes in it will have to be made. To grant under such circumstances immediate relief, subject to later readjustments, was no more a transfer of revenues pending a decision than was the like action, in cases involving general increases in rates, a transfer of revenues from the pockets of the shippers to the treasury

> of the carriers. That the order is not obnoxious to the due process clause, because provisional, is clear. If this were not so, most temporary injunctions would violate the Constitution.

The order should be made effective, that the companies may try out the rates and report results to the Commission, thus to establish the facts upon which the rights of the parties shall ultimately depend. That course has had the sanction of this Court repeatedly.

Knoxville v. *Knoxville Water Company*, 212 U. S., 1, 19, Mr. Justice Moody:

> But as the case now stands there is no such certainty that the rates prescribed will necessarily have the effect of denying to the companies such a return as would avoid confiscation.

Willcox v. *Consolidated Gas Co.*, 212 U. S. 19, 54, Mr. Justice Peckham:

> It may possibly be, however, that a practical experience of the effect of the act by actual operation under them might prevent the complainant from obtaining a fair return, as already described, and in that event complainant ought to have the opportunity of again presenting its case to the court.

Northern Pacific Railway v. *North Dakota*, 216 U. S. 579, 581, Mr. Justice Holmes:

> We do not say that experiment may not establish a case in the future that would require a decision upon the question of consti-

> tutional law. But we can express no opinion upon it now. The great difficulty in the attempt to measure the reasonableness of charges by reference to the cost of transporting the particular class of freight concerned is well known and often has been remarked. It seems to us that the nearest approach to justice that can be made at this time is to follow the precedent of *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, * * *.

Missouri Rate Cases, 230 U. S. 474, 508, Mr. Justice Hughes:

> The acts are valid upon their face as a proper exercise of governmental authority in the establishment of reasonable rates, and each complainant, in order to succeed in assailing them, must show that as to it the rates are confiscatory.

In re Louisville, Petitioner, 231 U. S. 639, 646, Mr. Justice McKenna:

> It will be observed, therefore, that an actual experiment of the rates had been voluntarily undertaken and had been in effect for more than eight months before the order under review was entered, and the court conceived that observation of the experiment might secure greater accuracy and confidence in the result, and, besides, inform the court of matters as they progressed.

See also *Minnesota Rate Cases*, 230 U. S. 352, 473; *Des Moines Gas Co.* v. *Des Moines*, 238, U. S. 153, 173; *Stanislaw County* v. *San Joaquin Co.*, 192 U. S. 201, 216.

X.

THE EXEMPTION OF CERTAIN CARRIERS IS NOT ARBITRARY.

The petition alleges (Tr. 13) that "The Commission proceeded upon this record to state in form that all carriers other than steam railroad carriers of Class I should be and were exempt from the application of paragraph 2 of section 22 of the Interstate Commerce Act," and that "The Commission delegated to each and several hundred carriers to determine the question whether they should or should not become subject to the law." It is further alleged that this action was arbitrary and in violation of the Fifth Amendment.

In *Wilson* v. *New*, 243 U. S. 332, the so-called Adamson Act establishing "an eight-hour day for employees of carriers engaged in interstate * * * commerce" (ch. 436, 39 Stat. 721) excepts from its provisions "railroads independently owned and operated not exceeding 100 miles in length, electric street railroads, and electric interurban railroads." Because of the exceptions the act was assailed as making an arbitrary classification. Mr. Chief Justice White, in delivering the opinion, said (p. 354):

> The want of equality is based upon two considerations. The one is the exemption of certain short line and electric railroads. We dismiss it because it has been adversely disposed of by many previous decisions. (Citing *Dow* v. *Beidelman*, 125 U. S. 680; *Chicago*,

Rock Island & Pacific Ry. Co. v. *Arkansas*, 219 U. S. 453; *Omaha & Council Bluffs Street Ry.* v. *Interstate Commerce Commission*, 230 U. S. 324; *Chesapeake & Ohio Ry. Co.* v. *Conley*, 230 U. S. 513, 522–524; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Arkansas*, 240 U. S. 518.)

See also *Stafford* v. *Wallace*, 258 U. S. 495, which sustained the validity of the so-called "Packers and Stockyards Act," which was assailed because the act exempted from its provisions "stockyards of which the area normally available for handling livestock, exclusive of runs, alleys, or passageways, is less than 20,000 square feet."

XI.

THE ORDER DOES NOT APPLY TO AND INCLUDE TRANSPORTATION OF PASSENGERS WHOLLY WITHIN ONE STATE.

In practically all recent petitions to set aside orders of the Commission it has become the practice to throw in as a makeweight the charge that the order applies to both interstate and intrastate commerce and is therefore void under *Employers' Liability Cases*, 207 U. S. 463, 504.

The order is in the usual form. So far as it affects intrastate commerce, the form is the same as the order in the *New England Divisions Case*.

The Amendment of August 18, 1922, to Section 22 is as much a part of the Interstate Commerce Act as any other section. The whole act must be construed together.

The amendment reaches "each carrier by rail, subject to this act."

Section 400 of the Transportation Act of 1920, amending Section 1 of the Act to Regulate Commerce, provides (41 Stat. 474):

> That the provisions of this act shall apply to common carriers engaged in—
>
> (a) The transportation of passengers or property wholly by railroad or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; * * * from one State or Territory * * * to any other State or Territory * * * but shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State * * *.

This provision was "stated, reasoned upon, enlarged, and explained" in *Railroad Commission of Wisconsin* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563; *State of New York* v. *United States*, 257 U. S. 591; *Lehigh Valley Railroad Co.* v. *Public Service Commission*, 272 Fed. Rep. 758, 767; *City of New York* v. *United States*, 272 Fed. Rep. 768; and *Stafford* v. *Wallace*, 258 U. S. 495, in which the Packers and Stockyards Act was assailed for the same reason. Also Appendix A, pp. 82, 83, 85, 86, 87; Appendix B, pp. 97, 98, 106, 107, 108.

XII.

CONCLUSION.

The decree should be reversed with directions to the District Court to sustain the motion of the United States to dismiss the petition.

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BLACKBURN ESTERLINE,
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APPENDIX A.

STATEMENTS OF SENATORS ON THE PENDING BILL.

Senator Robinson (Arkansas), January 18, 1922, said (Cong. Rec., vol. 62, pt. 2, pp. 1327, 1328, 1329, 1330, 1331, 1332, 1333):

> Mr. President, the demand for the issuance of mileage books for use in travel had become so great in the early part of 1921 that many Senators introduced bills upon the subject. Among those Senators may be mentioned the Senator from Indiana (Mr. Watson), whose bill is now under consideration; the Senator from Tennessee (Mr. McKellar), the Senator from Wisconsin (Mr. Lenroot), the Senator from Missouri (Mr. Spencer), the Senator from Georgia (Mr. Harris), and the Senator from Arkansas (Mr. Robinson.)
>
> * * * * *
>
> The bill provides for the issuance of mileage books at the rate of 2½ cents per mile. The average rate for passenger fares, according to my information, is now 3.6 cents per mile. It is noticeable that the bill contemplates the issuance of these books at a rate substantially lower than the prevailing average passenger rates. I believe that it is 25 per cent less than the average rates now in force.
>
> * * * * *
>
> The demand for this legislation in part grows out of the conditions which have arisen

respecting travel under the prevailing high-passenger rates. The bill does not make its benefits to any particular class of citizens. Any person who desires to do so is at liberty to purchase one of these books. The demand comes in large part from commercial travelers and their associations, manufacturing associations, jobbers' associations, farming organizations, theatrical and moving-picture companies, and, in general, organizations whose representatives travel a great deal.

Undoubtedly the principle upon which such legislation rests, and should be justified, is a recognition of wholesaling in transportation. I am not unmindful of the fact that some of the courts have stated in decisions that the principle of wholesaling is not recognized in the laws in connection with transportation. I have found no case, however, in which such a statement is more than obiter. Undoubtedly the principle of wholesaling is now and has for a long period been applied in connection with freight rates, and no reason can be assigned why it should be applied to freight rates and denied as to passenger rates.

Let us look for a few minutes at the recent history of mileage books in transportation. During the war, in order to diminish travel and thus enable the Government in the Federal operation of railroads more promptly and efficiently to handle freight business, indispensable in the successful conduct of the war, the Director General of Railroads issued

General Order No. 28, embracing section 8, effective June 10, 1918, as follows:

"No mileage ticket shall be issued at a rate that will afford a lower fare than the regular one-way tariff fare."

* * * * *

On August 2, 1918, passenger fare authority No. 26 was issued, reading in part as follows:

"Carriers under Federal control, and their authorized agents, are hereby authorized to supplement tariff now in effect canceling the sale of all forms of mileage and scrip books effective August 20, 1918, such supplements to provide that outstanding tickets will be honored within limit, under conditions shown in tariffs under which sold, or will be exchanged for new scrip books containing coupons of equivalent value."

By that authority mileage books were canceled and their issue forbidden. As I have already stated, one of the important purposes upon which those orders were justified was the desire to reduce travel at that time rather than to promote it. So far as my memory goes, it was not related closely to the purpose of increasing railway revenues.

* * * * *

Let me turn briefly to a consideration of what I believe will be the reasonable effect of this legislation. First, it will tend to stimulate travel. The railroad executives of the country do not seem to realize that by the maintenance of both excessive passenger and freight rates business which ordinarily should be conducted on the railroads is being diverted to other instrumentalities.

Throughout the United States better roads are being constructed and thousands of commercial travelers and others in the course of their regular business are employing automobiles for traveling and thousands of persons are receiving deliveries of freight through automobile trucks and similar means. The reason, in part, for it is that both passenger and freight rates are too high on the railroads. If freight rates were reduced to-morrow, judiciously reduced, intelligently reduced, it probably would promote more business and yield more revenue than the railroads are now receiving, and the same is equally true of passenger rates.

This diversion of traffic from railroads to automobiles and automobile trucks is a policy that is growing, and the railroads can only counteract it by doing something to invite and encourage the public to use their instrumentalities.

I wish to be frank. I am not a transportation expert, and I do not think I am qualified, to tell the Senate or anyone else just what will be the effect of a general increase or reduction in rates. For six months, under the order of the Senate, as a member of a joint commission of Congress I have been trying to look into that question. I know that thousands of cases exist where business is being discouraged, retarded, hampered, and hundreds of cases exist where it has been prevented by reason of the very excessive rates that are being charged by the railroads.

I know that thousands of traveling men in the United States, men who earn their living

as drummers or commercial travelers, have left the road. Some drummers are traveling in automobiles and others are staying at home, for the reason that the passenger rates which they are now compelled to pay have discouraged their employers and have induced them to adopt a restrictive policy in their business.

* * * * *

Just one moment. In the case of passenger rates, if thousands of men have been driven from the railroads to find new means of travel, and thousands of others have been kept at home by reason of the high rates, would it not have been more profitable to the railroads, instead of running empty trains as they are now doing throughout this country, to have filled their trains with passengers at somewhat lower fares?

* * * * *

Before I revert to the statement of the Senator from Iowa let me state that in going home from Washington to Little Rock, Ark., I have found the Pullman cars, which were crowded beyond their capacity prior to the installation of the present rates, since have been half filled to the point of St. Louis. Going from St. Louis south and southwest I frequently have enjoyed the privileges of a private car, few others riding in them, and principally for the reason that the rates have been made so high that the people will not pay them.

There is not a Senator here who travels who does not know that the great trains that come

thundering into the station in this city are coming with their parlor cars and their Pullmans half filled now. The passengers on a train that entered this station over one of the big lines a few days ago were counted, and there were scarcely a hundred. Would it not be more profitable to that railroad and to every other railroad, instead of operating these cars partly empty at the same cost that it would require to operate them when filled, to put into effect rates that would invite travel, and thus secure additional fares?

* * * * *

I said these rates were now so high that they discourage travel. The comparison I am making proves that. While the revenues for the first half of 1921, under the high rates I have already described, exceeded the revenues for the first half of 1920 by $8,666,000 plus, the number of fares paid was approximately $73,000,000 less in the first half of 1921 than in the first half of 1920. The number of fares paid in the first half of 1920 was 595,771,000. The number of fares paid in the same period of 1921 was only 522,195,000, or more than 73,000,000 less, tending to show that these rates did discourage travel very greatly.

In addition to that, not only were the number of fares sold under the high rate greatly diminished, as I have just shown, but the average journey traveled under the new and high rates for the first half of 1921 was only 35.4 miles, while the average journey under the lower rate in force in the first half of 1920 was 36.41 miles.

I have referred to the receipts from passenger fares by first-class railroads in the United States throughout the period beginning January 19, 1915, and extending to the end of the month of November, 1921. The December figures have not yet become available.

* * * * *

Mr. President, I come now to a consideration of the position taken by the Senator from Iowa (Mr. Cummins), and, as I understand it, by the Senator from Ohio (Mr. Pomerene), that this is a matter which the Interstate Commerce Commission is peculiarly qualified to determine and that the commission ought to be permitted to decide it.

With the general proposition that legislatures can not successfully fix transportation rates, I am in hearty accord. We do not possess the information nor the agencies necessary successfully and intelligently to perform such services. I wish to be entirely frank with the Senate. If I thought the commission would act and act promptly upon the matter I would have no objection to referring it to the Interstate Commerce Commission. But I am advised that the commission have had this matter under consideration for several months, and they stand approximately evenly divided on the question of policy. They now, in my opinion, have the power to authorize the issuance of mileage books in the exercise of their general power to fix just and reasonable rates.

* * * * *

They have the power to promulgate the general rate, which is the same thing in the end, if they choose to exercise it. The difficulty about the matter is this: The commission are overburdened with duties. They are performing very important and very difficult functions. They have been unable to reach an agreement respecting this subject. Merely to authorize the commission to do something which many think they have the power already to do, if they chose to exercise that power, would not be accomplishing very much. But conceding that the commission may not without legislation require the issuance of mileage books, an objection grows out of the fact that great delay will ensue if the matter is relegated to the commission. I do not believe any step Congress can take will more quickly and more vitally restore courage, enthusiasm, and interest among the people of the country in their business affairs than the passage of legislation of this character. It is not a question of general rate making, although, of course, the effect of our action here must be considered in relation to the broader and even more important question of revenues to railroads generally.

It is a comparatively simple matter. If the rate fixed in the bill, in the judgment of the Senate, is too low, if the Senate thinks that the Senator from Indiana (Mr. Watson) in preparing the bill and fixing the rate at which the mileage should be issued at 2½ cents per mile acted unwisely and that the rate ought to be increased, we can do it. We

have sufficient intelligence and information respecting the subject to wisely determine it. I think the rate is about right. The enactment of this legislation will have a wholesome effect. I do not see the slightest necessity for throwing it into the Interstate Commerce Commission, where we know there is such a division of opinion respecting the policy involved in the legislation and probably its relation to revenue that no action is likely to result if the amendment of the Senator from Iowa is agreed to.

I wish to see something done that will revive the business of the country. Nothing has contributed more to the present depressed state of business, to the diminution of the number of sales, to the loss of profits, and the maintenance in many localities of excessive prices than have exorbitant railroad rates. We have to meet this question. The courts in every decision have said that rate making is a legislative function. If we want mileage books issued, we have the power to require their issuance, if any power can require it. There is no reason why the Senate can not intelligently determine the very simple questions involved in the bill. The commission is authorized to modify the rate if that is found necessary.

Mr. President, I have profound regard for the judgment of the Senator from Iowa. In my opinion he is perhaps the best-informed man on transportation questions in the Congress of the United States. I have not only confidence in his judgment but unlimited con-

fidence in his integrity. I am looking at this question from the standpoint of the business interests of the country generally as well as from the standpoint of the interests of the railroads. I think my record in the Senate has demonstrated beyond necessity for vindication on my part, willingness to support and advocate legislation that would put the railroads of the United States on a secure basis and enable them to operate profitably.

I have no hesitancy in saying that I have been disappointed with the manner in which the transportation act has been applied through the instrumentality of the railway executives. Their policies in some particulars have depopularized the very liberal rule of rate making prescribed in that act. They ought to have gone forward in the carrying out of the act in a way that would draw to the railroads the confidence of the people whom they serve. Necessarily many rates in the new tariffs quickly proved the necessity for corrections. Railroad authorities have been slow to make them, slow to make any concessions. For fear of establishing precedents that might later rise to plague them they have stood still when they ought to have advanced.

I indulge the hope that the Senate, having full knowledge of the subject, will enact this legislation, and do it by an overwhelming vote.

Senator Cummins (Iowa), January 18, 1922, said (Cong. Rec., vol. 62, pt. 2, p. 1330):

So far as I am concerned—and I think what I say would be the judgment of every man who knows anything about this subject—there is a

point which measures the maximum producing qualities of a railroad rate, whether freight or passenger; and if the rate is advanced beyond that point the result will be a lessened revenue instead of an increased revenue.

The position I take with regard to this particular bill is that the Interstate Commerce Commission is the best judge with regard to that point, and where the line should be drawn. It is charged with that duty, and it exercises its jurisdiction after hearings and notice and after full information; and it has said that the rates which now prevail are at the point at which they will produce the maximum revenue. I, for one, do not feel like reviewing the action of the Interstate Commerce Commission and insisting that it is less qualified to enter a judgment upon this question than the Congress of the United States, which must necessarily act with very inadequate and imperfect information.

I wanted that to be made perfectly clear before the Senator proceeds further. I agree with everything that the Senator from Arkansas has said.

Senator Cummins (Iowa), January 19, 1923, said (Cong. Rec., vol. 62, pt. 2, pp. 1393, 1394, 1395, 1397, 1399, 1400, 1401, 1402, 1405):

Mr. President, I always listen to the Senator from Arkansas (Mr. Robinson), not only with great pleasure but with great profit. I think he discusses any question with distinguished fairness and clearness, and I am sorry that I feel compelled to dissent from some of the

conclusions to which he has arrived. For a long time during his service upon the Committee on Interstate Commerce of the Senate I think all the members of that committee learned to lean upon him for information and advice, and I, for one, acknowledge in this public way my very great obligation in the Senator from Arkansas for the work that he has performed in connection with this important and vital subject.

I think I ought to say another word, in a preliminary way, so that my position with regard to the general subject may not be misunderstood. I believe in the system of mileage books or tickets; I believe that form of transportation with respect to a great many people is exceedingly convenient. I think that the practice of issuing mileage books in this country ought to be resumed, and I have no doubt whatever that the Interstate Commerce Commission, when vested with the power, which it has not now, in my opinion, to require railroad companies to issue interchangeable mileage books, will speedily make the necessary order.

The question, however, with regard to the difference which shall be established between the ordinary ticket and the mileage book is a question upon which we are not qualified to express a judgment. While the Senator from Arkansas has paid me a very great compliment, which I deeply appreciate, I want to say in all candor that even though I have studied this subject for many years it would be utterly impossible for me, with the information I have,

to determine what should be the difference, if any, as between the ordinary ticket for a specific journey and the mileage book good for any journey.

* * * * *

Second, if it were constitutional, it is manifestly unwise for Congress to attempt to fix either freight rates or passenger rates.

Third, because just at this time we ought not to put any obstacle in the way of the efforts of the commission or the carriers to reduce freight rates. The passage of this bill, as it is now before the Senate, will just as surely arrest the progress of that movement as that time is to go on.

Fourth, the difference of practically 1 cent per mile would be the grossest sort of discrimination in favor of corporations and individuals who can afford to buy $125 worth of transportation at one time.

Fifth, because it takes direct possession of the authority which, in my judgment, is vested in the several States and attempts to to fix passenger rates within the States and for journeys wholly within the borders of a single State. As earnestly as some advocates of universal and national control have contended for the proposition, Congress never yet has attempted to assert the power of fixing, primarily and directly, the rates either for the transportation of freight or the transportation of passengers wholly within a State.

I shall address myself to these objections in the order that I have named them, first asking that the amendment which I have

offered shall be printed not only, as it would naturally be, in the Record but that it shall be printed so that if this bill is not disposed of to-night it can be laid upon the desks of the several Members of the Senate to-morrow morning.

It must be observed from what I have stated that I do not approach the discussion of this question in a hostile spirit. I mean, I recognize the demand which the commercial travelers of the United States have made for this form of transportation, and I am not prepared to say that they should not have the privilege of buying transportation at wholesale at lower rates than the person who buys a specific ticket for a particular journey. In so far as the selling of transportation in this way and in so far as all the operations which are connected with that transportation are concerned which tend to reduce the cost of the service, the Interstate Commerce Commission may very well, in my judgment, establish a lower rate per mile than the ordinary rate which is now in force or which may be in force at any given time.

I want your attention for a moment to the question of constitutionality.

It would be rather impertinent on my part to enter upon an extensive argument upon the proposition I have just made, inasmuch as I have before me a decision of the Supreme Court of the United States which, in my judgment, is exactly and precisely applicable to the present bill. I beg to say that we have given to the Interstate Commerce Commission

the authority to establish maximum rates—latterly minimum rates also, in some cases—but the general authority is to establish maximum reasonable rates for the carriage of passengers and the transportation of freight. I mention that in order to show that the authority we have given the Interstate Commerce Commission, so far as interstate commerce is concerned, is exactly the authority which the Legislature of Michigan attempted to exercise over the State rates in the case I have before me.

* * * * *

Mr. President, I believe that the Interstate Commerce Commission, in accordance with the principle of this opinion, after it makes the proper investigation, and after it determines that the cost of the service, if it so finds, is less in the case of mileage tickets than in the case of specific tickets, can make a reasonable, fair reduction in passenger fares in behalf of those who use mileage tickets; but it must not be an arbitrary reduction. It must be based upon sound, economic reasons. It must be based upon precisely the same reasons, in principle, which obtain in the case referred to by the Senator from Arkansas in freight rates. The rate per hundred pounds is less in the movement of freight in carload lots than when it is moved in less than carload lots, and for very plain, manifest reasons, because the railroad company can move a given number of pounds in carload lots at a lower cost than it can move the same number of pounds in less than carload lots, and it would be unfair

to establish a tariff that would require the payment of the same rate per pound or per hundred pounds or per ton of freight in carload lots and in less than carload lots.

I want the Senate to remember that the man who has one carload to move moves it at the same rate given to the man who has a hundred carloads of that commodity to move. There is no reduction in the carload rate on account of the number of carloads that any particular shipper may desire to ship. That question has been argued at very great length. It has been urged upon the Interstate Commerce Commission almost from the time the commission was organized, that a great shipper, like the United States Steel Co., or the Standard Oil Co., or any other great factory which furnishes hundreds and thousands of carloads every month or every year, is entitled to a lower rate per carload than the shipper who ships but one carload per year of that commodity; but the commission has stood steadfastly and firmly against the effort to reduce the carload rates because of the extent of the business of the shipper, and I think very wisely.

In this case if the commission, after its investigation, finds that the railroads can afford, by reason of lessened cost, to sell 5,000-mile tickets or 2,000-mile tickets, I believe it has, or would have if my amendment were passed, the authority to require the railroads to issue those tickets; but an act simply declaring that every railroad in the United States shall issue 5,000-mile tickets, usable

and good upon every other railroad in the United States, when the rate established by the commission as a fair and reasonable rate for travel is substantially 1 cent per mile higher than that mentioned in the bill before us, is beyond our power. It is not only unfair and unjust, but it is not within our constitutional authority to enact.

Every man who knows anything about the subject knows that there is not the difference of 1 cent or 1⅓ cents per mile in the cost of the service, comparing mileage tickets and specific tickets. There may be some difference; I am not prepared to say what it is. I am not well enough informed to say what it is, any more than I am well enough informed to say what should be the rate upon a carload of apples from Arkansas to Chicago or New York. Whenever the Congress of the United States enters upon the field of determining at what rate either commodities or persons shall be carried throughout the United States, it will not only enter a field of chaos and confusion but it will inflict infinite injury not on the railroads alone but upon the commerce of the country as well.

We have organized a commission which has now been functioning for about 26 years, and its members are constantly investigating these subjects, and they are as familiar with them as their mentality will permit them to be. That commission is the proper authority to declare what the rate upon a mileage ticket shall be.

* * * * *

The third objection which I have to the passage of the measure at this time relates to a provision which I shall read again, because just at this time we ought not to put any obstacle in the way of the efforts of the commission or the carriers to reduce freight rates. The passage of the bill that is now before the Senate would just as surely arrest the progress of that movement as time is to go on. We all know that ever since the increase in rates, since the return of the properties to the owners, an increase that was ordered on the 26th of August, 1920, there has been a continuous and, as I thought, praiseworthy endeavor on the part of those who were interested in the commerce of the country to secure a reduction in the rates that were thus established in what is known or referred to by the Senator from Arkansas as Ex parte 74.

It was quite impossible, as everybody will see, for the commission having in charge the reestablishment of the credit of the railroad companies, among other things, and having in charge a commerce that is inestimable in magnitude, to issue any order that would be just in all its parts. The commission has been constantly reviewing that order. I suppose there have been 5,000 reductions in rates or readjustments in rates since August 26, 1920.

* * * * *

It has been the policy of the United States for years to submit to an impartial, semijudicial body the question of the just and reasonable rates that ought to prevail throughout the United States, both for the carriage of passengers and the transportation of freight. The

Interstate Commerce Commission is now and has been for a long time, for a year past and more, engaged in an investigation looking to a reduction of all rates, if it be possible to reduce them in view of conditions which now prevail.

I have not even imagined the possibility that Congress at this time or at any time would withdraw from the jurisdiction of the Interstate Commerce Commission the duty of fixing freight rates. For Congress to enter upon the task of adjusting the freight rates of the United States would be simply to publish its incapacity to deal with the subject.

* * * * *

In order to ascertain as well as I could what would be the probable effect of the passage of this bill upon the revenues of the railroad companies, I submitted to the Interstate Commerce Commission an inquiry, and I have the answer of the commission before me. I do not intend to read all of it, because all of it is not material to the point I am now discussing; but part of it is very material.

* * * * *

If we assume, taking the country over, that 25 per cent of the travel would be carried upon mileage books, then upon the average passenger traffic of the last two years the result would be a dimunition in revenue of $69,200,000. If we add to the $69,200,000 a fair proportion of the Pullman surcharge, which would also be abolished by this bill, the fair result is that the revenue of the railroad companies would be reduced eighty

or eighty-five million dollars a year through the application of the provisions of this bill.

I am not considering whether this reduction would result in such an increase in travel that the net income might be greater than heretofore simply for the reason that that is a question which has been before the Interstate Commerce Commission continuously since the passage of the transportation act—a question upon which that tribunal is infinitely better able to express an opinion than I am or than any other man, in my judgment, who may have occasion to study it casually. It looks at the question from every angle, from every standpoint, and fixes rates accordingly. It is one of the things which, according to the letter of the opinions rendered by the Interstate Commerce Commission, it has taken and must take into consideration.

Mr. President, if we are to accept the judgment of the Interstate Commerce Commission upon questions of that kind, are we prepared to reduce by legislation the passenger revenues of the railroad companies of the country to the extent of eighty or eighty-five million dollars annually?

That is the question we must finally decide by the votes we cast upon this bill.

* * * * *

Mr. ROBINSON. If the Senator from Iowa will permit me, the Interstate Commerce Commission has no power and can have no power which the Congress does not give it. I do not wish to interrupt the Senator from Iowa to again express my view respecting the subject

but, I think, if Congress has sufficient intelligence and information upon which to determine this question, it can be no reflection on the Interstate Commerce Commission if Congress determines the matter directly.

Mr. CUMMINS. I do not know whether it would be construed as a reflection upon the individual members of the Interstate Commerce Commission or not, but it means that we ought to abolish the Interstate Commerce Commission. If Congress is to undertake to fix rates, there is no necessity for the Interstate Commerce Commission.

* * * * *

I propose to give the Interstate Commerce Commission authority to compel railroad companies to issue mileage books good for not more than 5,000 nor less than 1,000 miles at a just and reasonable rate. That is all. I can conceive of reasons which would justify some difference between the general rate and the mileage-book rate, because there is, I can easily see, some lessened cost of service when one buys 2,000 or 5,000 miles of transportation as against a man who buys 20 or 25 miles of transportation. But I do not pretend to know what that difference would be, if any. It must be supported by such evidence as will show that it is not a discrimination against the man who uses the ordinary ticket.

I am sorry the Senator from Wisconsin did not quite gather the full import of my amendment. That is the very point I want to avoid. I want the discrimination, if there shall be one, based upon sound, economic

reason, and there are some reasons that might influence the commission to issue a mileage book at a slightly less rate than the price of the ordinary ticket.

Mr. LENROOT. I understood the Senator to say it would be difficult for him to explain why a traveling man with a mileage book was permitted to ride at a less rate than one who did not have a mileage book. With the Senator's explanation it seems to me that result will still obtain; that he does contemplate that with this power reposed in the commission by his amendment the commission will have power to compel the sale of mileage books at a less rate than is charged the ordinary traveler who does not purchase them.

Mr. CUMMINS. I am assuming that men who ride on trains are ordinarily intelligent, and while they could easily perceive a justification for some difference in the rates they would not be able to perceive a reason for a difference of 1 cent per mile in the rate.

It is exactly like moving freight in carload lots as distinguished from less than carload lots. The railroads move, and the Interstate Commerce Commission orders them to move, freight in carload lots at a cheaper rate per hundred pounds than the less-than-carload movement is carried for, but it must be a just and reasonable rate; it must be based upon, as I view it, the cost of the service in the two cases. So, Mr. President, I submit that it is the fair conclusion from the facts and conditions which surround us that

if we pass this bill it will constitute a most serious obstacle in the way of a further reduction in freight rates.

* * * * *

Senator Trammell, January 19, 1922 (Cong. Rec. vol. 62, pt. 2, p. 1405):

Prior to the abolishing of the mileage-book privilege, as we all know, the railroads maintained a policy of issuing mileage books in denominations of 1,000 miles, or 2,000 or 5,000 miles.

Under a policy of that kind the average person doing any traveling of any consequence receives the benefit of the privilege of purchasing a mileage book at a reduced rate. I think that if we are going to reestablish this privilege of mileage books, we should not select a favored class, those who are carrying on extensive business, having their agents do extensive traveling, or those with ample means to buy mileage books, and extend the privilege to them only. That will be the inevitable consequence if the privilege is extended only to mileage books of 5,000 miles or more.

I submit the amendment with a view to restoring the policy that formerly existed under the voluntary operations of the railroads. I believe that it is a proper policy, and that the measure should be enacted; but if we are to enact a law of this character, then I believe that we should provide for mileage books in denominations of 1,000 miles or more, and not begin at 5,000 miles.

Quite a good deal has been said about leaving this matter to the discretion of the Interstate

Commerce Commission. I see no reason why the Congress should longer go upon the idea that we must leave to the Interstate Commerce Commission the adjustment of all these problems. What is the history of the State railroad commissions in dealing with this question of passenger transportation? We found in a great many States that the railroad commission of the State did not prescribe as low a rate for passenger transportation as it seemed to the public that conditions justified. On account of the failure of these commissions in some instances—I do not say all of them—to take action providing for more reasonable transportation charges for the traveling public, the legislatures in a great many States have enacted laws prescribing specifically passenger rates. Among the cases that were quite noted in the South was the Alabama Rate Case.

* * * * *

Mr. President, I believe that a more reasonable charge for passenger travel will result beneficially to the railroads, and most assuredly will result beneficially and helpfully to the traveling public, and I hope this measure will be enacted.

I believe, however, that the measure would be improved and that it would come nearer meeting the situation if the amendment which I have proposed should be agreed to. If this amendment should be adopted, then the privilege of a mileage book will apply to mileage books of 1,000 miles and larger amounts. Certainly the mileage-book privilege should be reestablished.

Senator Capper (Kansas), January 20, 1922, said (Cong. Rec., vol. 62, pt. 2, p. 1454):

> Mr. President, I sympathize with the purpose that this bill aims to carry out. I believe that passenger as well as freight rates are too high; but I agree with the senior Senator from Iowa (Mr. Cummins) that Congress should exercise its power by delegating the authority to issue mileage books to the Interstate Commerce Commission. I think the proposition of the Senator from Iowa is incontrovertible, that if Congress should enact this measure without the amendment proposed by him the result would be that the Interstate Commerce Commission would have to take into account the reduction in revenues that such a change in the passenger rates would bring about before it could pass upon the question of a reduction in freight rates. The result then would be a delay in the determination of the matter of freight-rate reduction, which, in my judgment, is a far more important matter.
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> * * * * *
>
> The VICE PRESIDENT. The next amendment is that proposed by the Senator from Michigan (Mr. Townsend), which the Secretary will report.
>
> The ASSISTANT SECRETARY. Amend the bill by striking from lines 2, 3, and 4, on page 2, the comma after the word "carrier" and the words "without regard as to whether the points of origin and destination for any single journey or within the same State." The amendment was agreed to. (Cong. Rec., vol. 62, pt. 2, p. 1499.)

Senator Trammell (Florida), January 21, 1922, said (Cong. Rec., vol. 62, pt. 2, p. 1500):

> The original bill provided that mileage books should be issued regardless of whether the point of origin and destination were within the State where the ticket was sold. With that provision stricken out, when the Interstate Commerce Commission comes to issue rules and regulations for the enforcement of the law we know of course that there will be no opportunity or chance whatever for commercial travelers representing firms within a given State and confining their travels within that State and for the citizens of a given State traveling within that State to participate in the benefits of the law.
>
> I hope that the amendment will be reconsidered and that the bill will be allowed to stand as it originally came from the committee. Then this question may be subsequently determined, and, if possible, traveling salesmen whose labors are restricted within the borders of a particular State and the traveling public whose travels are largely within a particular State may obtain some benefit under the bill. If the amendment stands as adopted, there is no question that they will receive no benefit whatever under this measure. I desire for the bill to retain the provision under which the people of my State—commercial salesmen or others—may have the privilege of obtaining mileage tickets that can be used in traveling within Florida. The amendment of the Senator from Michigan strikes this paragraph from the bill. I am

opposed to his amendment. It should be reconsidered and defeated.

* * * * *

Mr. WATSON of Indiana. The proposed rate was 2½ cents a mile, as stated by the Senator.

Mr. POMERENE. That meant, if the bill had become a law in that shape, that the Interstate Commerce Commission should require the railroads to issue mileage books at 2½ cents per mile, notwithstanding the fact that, for instance, in some of the intermountain regions the rate is usually 4 or 5 cents per mile. Anyone who is familiar with the construction and operation of the railroads in those sections knows that it would be physically impossible for the roads to maintain themselves at such a rate as 2½ cents per mile. That was one of the serious objections to the legislation.

* * * * *

Mr. POMERENE. Mr. President, if the Senator will permit me, I have not talked with the Senator from Wisconsin on this subject, but I have talked with several of the other members of the committee, and I have heard one member of the committee say that he doubted very seriously whether the bill was constitutional, and two others express their doubt, and all of them were good lawyers.

Mr. KING. Mr. President, we sometimes condemn the Supreme Court when they say that a law is unconstitutional. If we have any doubts on that score, it seems to me it is better to try to resolve them, if we can, here before, to use the language of the street, we

"pass the buck" to the Supreme Court. It was said by Jefferson, and that view was announced by Hamilton, indirectly, and also by many of the great men in the beginning of our Government, that when we had doubt as to the constitutionality of an act we ought not to pass it. Certainly, if we have doubt we ought to hesitate, we ought to discuss the question involved, in order if possible that the doubt may be dissipated and we may reach a satisfactory conclusion as to what course we should pursue.

Mr. WATSON of Indiana. Mr. President, I should like to make the suggestion to my friend from Ohio that this is an act to amend the interstate commerce act, and that with the word "interstate" stricken out the language is, "Good for passenger carriage upon the passenger trains of all carriers by rail subject to this act."

What act? The interstate commerce act. What carriers by rail are subject to the interstate commerce act? Necessarily interstate carriers; and I am asking the Senator whether this language does not obviate the necessity of any change. (Cong. Rec. vol. 62, pt. 10, p. 9905.)

The PRESIDING OFFICER. Does the Senator from Indiana yield to the Senator from Minnesota?

Mr. WATSON of Indiana. Yes.

Mr. NELSON. It seems to me that merely striking out the word "interstate" does not change the law. It leaves the commission with the power which it has generally, and that power is to fix interstate rates, primarily.

Mr. WATSON of Indiana. Precisely.

Mr. NELSON. And the mere fact that you strike out the word does not in itself give them power over intrastate rates.

Mr. WATSON of Indiana. That is precisely my view.

Mr. NELSON. The mere fact that you strike out that word does not in itself give them power over State rates. It leaves them with the power which they possess under the general Esch-Cummins law.

Mr. KING. Mr. President, may I ask the Senator from Indiana a question?

Mr. WATSON of Indiana. Certainly.

Mr. KING. The Senator is supporting this bill and the committee and the others who are supporting it are doing so upon the theory that it relates to interstate commerce and not intrastate commerce?

Mr. WATSON of Indiana. That is my theory; yes.

Mr. KING. And there is no intention to invade the rights of the States or State commissions to deal with matters that are intrastate in character?

Mr. WATSON of Indiana. No; that is my theory. I have talked with the Senator from Iowa (Mr. Cummins) about this bill. We all know that he is a very able lawyer on all questions pertaining to railroad legislation, and he said to me: "Well, you can go on and bring it up." He said, "I am not quite clear about the constitutionality of it; but, after all, the language may be such that it does not confer upon the commission power to do

anything other than it already has the power to do so far as its relation to interstate commerce is concerned." The same thing is true of the Senator from Minnesota (Mr. Kellogg), whom we all know to be a very profound lawyer on these constitutional questions. (Cong. Rec., vol. 62, pt. 10, p. 9906.)

APPENDIX B.

STATEMENTS OF REPRESENTATIVES ON THE PENDING BILL.

Representative Fess (Ohio), June 29, 1922, said (Cong. Rec., vol. 62, pt. 9, p. 9713):

> I do not understand the source of the objection to serving the public in making possible this convenience, because it does no harm either to the public or to the patrons or to the railroads. I understand that the law is so drafted as to protect the railroads. I do not see how the railroads are interfered with in their property rights, since there is no decree, but simply permission to the Interstate Commerce Commission. I do not see the basis of the charge that there is particular advantage to anyone or to any particular class over another. The rights of the public, which are primary in legislation, are conserved, the convenience of the traveling public is respected, and the rights of the railroads are regarded. For these reasons I voted for the rule to make this a special order, and I shall vote for the bill, not as a new venture but rather an expansion of a practice years ago.
>
> Mr. Speaker, every Member of this body recalls the time when the issuance of mileage books for the convenience of the traveling public was a practice pursued by most of the

railroads before the Government inaugurated its policy of Government regulation. It was found to be of great service to the traveler and no loss to the company issuing it and the practice met with wide approval.

An interchangeable book was issued limited to specified roads. While this plan was designed to favor the traveling public, its restrictions for the protection of the issuing company proved somewhat burdensome. During the war the Government adopted a form of interchangeable ticket, common terminals, and consolidated ticket offices. This effort to operate the various roads as a complete system, so far as the traveler was concerned, had some distinctive advantages.

There has always been a genuine demand for an interchangeable mileage privilege. Past practices prove it is workable, and there can be no doubt of its great convenience to the man whose chief activity is on the road. Railroad management has generally considered the convenience of the traveling public and its good will as valuable assets in transportation. Much thought and effort have been exerted along these lines. The mileage book avoids the necessity of the congested ticket-office window and the loss of time waiting in line to purchase the ticket. When made interchangeable its convenience is multiplied.

The charge that it is favoritism in legislation is without force. It is a principle of business universally followed by all responsible concerns to give advantages to induce the larger sales for cash payments.

> This recognition is due the commercial traveler. Here is a class of our business life which much of the time live away from home, constantly en route, whose chief outlay is to the transportation companies. His success is not confined to his home, but it represents in a most substantial way the income of the transportation lines, since the goods for which his contracts stand are transported over the railroads. His success will be reflected in the receipts of the road, not only in the actual outlay for his mileage but in freight shipped in accordance with the contracts secured. Here is an army of business boosters on the go. Taken as a whole they cover the entire Nation, if not a good portion of the world, touching every center, big or small, where business is carried on.

Representative Snell (New York), June 29, 1922, said (Cong. Rec., vol. 62, pt. 9, p. 9712):

> Mr. Speaker, this resolution, if adopted, provides for the consideration of S. 848, which is known as the interchangeable mileage bill. It is thought that the rights of the railroads are fully protected by the provisions of the bill. There is a general demand all over the country for the consideration of this bill at the present time, and therefore we have presented the resolution.

Representative Huddleston (Alabama), June 29, 1922, said (Cong. Rec., vol. 62, pt. 9, p. 9712):

> Now, this bill is brought forward on the pretense and under the guise that it will make a reduction in fares to people who are able

to buy transportation at wholesale. If it meant any such thing, if it really meant that, no honest man could afford to vote for it, because no honest man can afford to vote to give commercial travelers or anybody else something at the expense of the general public.

The Interstate Commerce Commission has decided that railroad fares are as low as they can be made so as to yield the lawful return. If you give any group the benefit of lower fares, you have got to make up the loss out of the general public. In the dearly beloved Esch-Cummins bill we have adopted the principle that the Government will see to it that the railroads are allowed to charge such rates and fares as will cover the cost of the service they render and to provide a $5\frac{3}{4}$ per cent profit on top of that. We have established that as the policy of this country. Out of whom are they going to get this cost of service and the profit—this Esch-Cummins return? They have to get it out of somebody. If Congress gives to any group a lower rate than will yield that, then the deficit has got to be made up by overcharging the general public.

I ask the committee whether it is their genuine purpose to give commercial travelers fares which are less than they reasonably and rightfully ought to pay, with the intent to make up what the railroads may lose on carrying commercial travelers out of the general public of this country?

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> I am in a funny quandary. If this bill meant what its sponsors want it to mean and what the committee are pretending that it means—that is, that purchasers of mileage books and coupon tickets shall ride the trains at the expense of the general public—of course I could not vote for it. On the other hand, if it means that all such persons are to pay their own way, which, if the evidence before the committee is to be believed, will be as much or more than the general public will pay, there can be no objection to passing the bill. The thing that sticks me is, I do not like to be a party to perpetrating a fraud on the commercial travelers or anybody else.

Representative Winslow (Massachusetts), June 29, 1922, said (Cong. Rec. Vol. 62, pt. 9, p. 9714):

> We had hearings during a number of days, very interesting hearings. A great many representatives of the travelers' organizations came and stated their case. We at that time were in the midst of hearings on broader propositions affecting the transportation act, 1920. It duly occurred to the committee that we had better develop the general problem a little further with a view of gaining more information that might bear on this particular mileage book bill and so be able, maybe, to arrive at a better final judgment. We therefore postponed further hearings on this bill for a while and later on took them up again and completed them. The bill which came to us from the Senate was merely a bill to direct the Interstate Commerce Commis-

sion after a careful inquiry, after notice and hearing, to require each rail carrier coming under the interstate commerce act to issue mileage books under such regulations and conditions as the commission might see fit to establish. That is all there was to the bill.

* * * * *

Mr. HUDSPETH. I will state there is a misapprehension on this side that it was confined to a certain class of travelers.

Mr. WINSLOW. It is not; the gentleman is quite right in pressing his inquiry. While this point is up let me repeat clearly what the traveling man understands. This is not a bill for a class, any class at all, but it is a bill for anybody who has the price and the desire to buy tickets at wholesale in such quantities as may be properly determined after notice and hearing by the Interstate Commerce Commission, in behalf of the buyers of wholesale transportation. Does that clear the matter?

Mr. HUDSPETH. It does.

Mr. WINSLOW. I want to say for the commercial travelers that they never held out that we should pass legislation which ultimately might favor them in preference to anybody else, but on the contrary they were very positive in their statements at the outset that the provision should be general for all who might desire to buy a mileage book. Now, bear in mind, gentlemen, that there are two things to consider particularly. One is the scrip coupon which in the art of transportation is a book with a lot of little pieces of scrip detachable in book form, each one of the

scrip representing a definite money value without any connection with mileage whatever, just money value. Say we had 100 on a page, each one worth 5 cents, there would be $5 worth of coupons, transportation coupons in one form or another as the commission might determine regulations. The other one is in a mileage book. That is like the book of scrip except each little coupon, whether for use either on the train or for exchange at the ticket window, is good for a mile of travel, whether that mile shall cost 1 or 20 cents.

The scrip coupon is good only for the value of each particular scrip. It is important to get the differentiation in your mind to understand this bill, and once you have that, you have the whole thing.

The Interstate Commerce Commission represented by our friend of a year or two ago, the Hon. John J. Esch, stated to the committee that they had misgivings as to their rights to order the issue of mileage books as provided by the Senate bill. That created a doubt in our minds. Various members of our committee entertained like opinions in respect of that and other legal considerations. Moreover, as the gentleman from Ohio (Mr. Fess) has told you, the fares which are allowed to be charged by railroads by the Interstate Commerce Commission, which has the right to establish fares, run, usually speaking, from 3.6 cents a mile up to 6 cents.

The committee realized right away that it was impossible to issue a mileage book in justice to all the rail carriers of the country,

with any definite value or charge for a mileage coupon. For instance, I take one end and go onto a road where the fare is 3.6 cents. If I had bought that coupon book on the base cost of 3.6 cents, I could use it there, good for a mile, but if I took the same book and went on a connecting line, where the fare was 4¾ cents, what would it mean? It would mean that every conductor would have to have a bookkeeper, an auditor, and a cashier, perhaps, in order to figure up what those fares would be from place to place. It would not be workable or reasonable. So what do we do to meet the situation and still give the commercial traveler every opportunity he has under the Senate bill? We made the provision that the Interstate Commerce Commission should have authority to direct the issue of a mileage book which would be usable equitably on a vast majority of the railroads which might be charging a definite and uniform mileage; but we provided for allowing the Interstate Commerce Commission to exempt a minority of the roads whose fares would be different, the idea being if they saw fit, in their wisdom, after notice and hearing, to direct the issue of a mileage book, they would see this book is good on all the railroads, each coupon for a mile, except on those eliminated. In that case you would not get a universal interchangeable mileage book; but we have left the bill in such form that the commission, in its wisdom and in accordance with the conditions at the time they may legislate, can give the authority to direct the issue of generally

interchangeable, universal mileage books and can exempt certain roads but make the coupons good on the balance of the roads of the country. So much for that.

The other one is this: Failing to find a way in which wisely to bring about the issue of a mileage book, we have provided for the issuance of a scrip book, if the commission wants to direct the issue of such in the interest and convenience of travel. In other words, the coupon has a definite value, and the commission is given authority to make rules and regulations. Under this bill the commission may establish a definite rate per mile or it may establish a definite value for scrip, or it may indicate a discount from one or the other if they choose and think it a wise thing to do.

There has been but one objection to scrip, however, and that is the scalper, and in order to forestall that sort of thing, which was a great nuisance in the old days of the joint mileage books, so-called, on certain railroads, we provided an amendment in addition to the provisions of the Senate bill, which amendment provided for a fine not to exceed $1,000 for anyone who shall willfully offer for sale or carriage any such coupon contrary to the commission's rules and regulations. In that way we can swoop down on the scalper if he offers any ticket for sale which he might get at a discount and then turn them for single tickets.

I believe I have covered the subject pretty generally. If not, my willing and qualified associates will take the matter up later on.

* * * * *

Mr. CURRY. I notice on page 2, line 4, of the original bill you strike out the word "interstate" by a committee amendment. What authority has Congress to legislate for intrastate rates, and why was the word "interstate" stricken out?

Mr. WINSLOW. For the reason that this bill covers only such railroads as are under the jurisdiction of the Interstate Commerce Commission.

Mr. CURRY. Under the reading of this bill it does cover other lines.

Mr. WINSLOW. No; it covers only those which come under the transportation act, 1920.

Mr. CURRY. Straight mileage or scrip coupon books at just and reasonable rates could have passenger rates granted upon passenger trains?

Mr. WINSLOW. Yes.

Mr. CURRY. Now you strike out "interstate," and of course the intrastate rates are subject to the Interstate Commerce Commission in interstate traffic, but in the State of New York or in the State of California or the State of Pennsylvania what authority has the Congress to legislate or give authority to the Interstate Commerce Commission to make local rates and compel them to take within the State this mileage book?

Mr. WINSLOW. I do not understand that that comes under this provision of the bill. The gentleman is talking about an interstate carrier?

Mr. CURRY. Yes.

Mr. WINSLOW. They have the privilege of establishing the rates at which they will carry them on a coupon book. What difference whether under a coupon book or without it?

Mr. CURRY. They have not the authority to fix intrastate rates?

Mr. WINSLOW. No; not unless they become a part of an interstate system.

Representative Hawes (Missouri), June 29, 1922, said (Cong. Rec., vol. 62, pt. 9, p. 9716):

Mr. Chairman and gentlemen of the House, as a member of the committee that studied this bill and recommends its passage I would not have the impression go out, as indicated by the gentleman from Alabama, that the proponents of this measure do not understand the bill and every portion of it.

I asked the counsel for the Travelers' Association, composed of 600,000 men, whether they understood this bill to mean that rates would be lowered or if, on the contrary, whether the Interstate Commerce Commission could not, if it desired, actually raise the rates. He said that was his understanding. So this bill does but one thing—it provides a forum for the traveling men of the United States where they can be heard in asking for an interchangeable mileage book or interchangeable scrip tickets. This bill provides a place of hearing. If the national rate-making body desires to lower the rate, it is for them to say upon full hearing and investigation. They may actually, if they so

desire, raise the rates. So the traveling men of America, if the House passes this bill, are not being deceived. They understand exactly what the bill provides for. It is true that the original bill introduced in the Senate had a fixed rate per mile, but in the argument before the committee in the Senate and upon the floor of the Senate the proponents of this bill discovered that that could not be done; that Congress could not fix rates for railroads. So when the bill came into the House before our committee, they had abandoned that position. They understand this bill thoroughly; they want it passed; there is no misunderstanding about it, and all it does is to provide a forum, a place of hearing, for the traveling men of America.

Mr. JOHNSON of Washington. Will the gentleman yield?

Mr. HAWES. Yes.

Mr. JOHNSON of Washington. I take it that the coupon book is not to be sold to traveling men alone; any man can buy a mileage book?

Mr. HAWES. Certainly.

Mr. WALSH. There is nothing in the proposed legislation that would permit the Interstate Commerce Commission by regulation to restrict people who might purchase it, is there?

Mr. HAWES. No, sir.

Mr. WALSH. It would be open to the general public?

Mr. HAWES. Yes.

Representative Barkley (Kentucky) June 29, 1922, said (Cong. Rec., vol. 62, pt. 9, p. 9716):

> Prior to the war, when these books were issued by the roads, they were issued at a reduction in the rate below the regular passenger fare. Roads that had a 3-cent regular rate issued these books, I think, at 2½ cents per mile. Some of them, I think, issued them at a rate as low as 2 cents. When the roads were taken back by the owners it was not long until the public began to notice that it was impossible to purchase these mileage books, and even where they were purchased they were not purchased with any reduction in the rate below the regular passenger fare, and most of them were not interchangeable.
>
> I think it is correct to say that very few of the roads have resumed issuing these mileage books, and still fewer of them have issued them interchangeably for use on other roads than their own. Very naturally, as a matter of convenience and economy, there began to be developed a sentiment in favor of the resumption of the practice of issuing these mileage books, and as the roads refused to do it and the Interstate Commerce Commission claimed it had no authority to compel them to do it, a request was made of Congress to pass a law that would require the roads to issue these books. Most of the bills introduced provided for a reduction of the rate below the regular passenger rate. I myself introduced a bill on the subject which provided for a reduction below the regular passenger fare; but when the Senate passed the bill some

question was raised about the constitutionality of a measure which provided that Congress should stipulate that these books should be issued at less than the regular passenger rate, on the ground that Congress was thereby legislating the rate for passenger traffic in the United States. It might be argued in favor of the constitutionality of that provision that Congress, when it fixed the so-called 6 per cent guaranty, attempted to authorize the Interstate Commerce Commission to fix rates high enough to aggregate a return of 6 per cent. But be that as it may, the Senate refused to enact a law providing for any definite reduction below the particular fare or figure at the time and left that matter entirely in the discretion of the Interstate Commerce Commission.

Now, it is true, as the gentleman from Massachusetts (Mr. Winslow) has explained, that this bill is not drawn in behalf of any class or any group. It is true that the traveling men of the country, whose business is on the railroads, and who, of course, appreciate the convenience of a mileage book and also the convenience of economy of a slight reduction from the regular rate where they use these books, have urged this legislation. But these books will be available to the general public on equal terms. The traveling men will appreciate that economy, but in view of the difficulties that have arisen, both in the Senate and in our committee, upon that point, the bill has been reported so far as the committee is concerned in the shape in which it passed the Senate,

leaving it entirely to the Interstate Commerce Commission to say what a reasonable rate shall be, and providing that they shall have the power to provide a rate after hearing all the parties concerned. And that is what the men who appeared before our committee asked for, namely, a chance to go before the Interstate Commerce Commission and present their case and an opportunity whereby they could take their chances with the commission to secure a reduction in the rate below the regular rate for the issue of mileage books.

While it is true that this bill has not been drawn in behalf of any class or any particular group, yet I may say that one particular group has been perhaps more prominent in asking for the passage of this bill than others, because their business is largely on the railroads, and they appreciate more keenly the disadvantage of not having the benefit of mileage books.

But prior to the taking over of the railroads during the war these mileage tickets were accessible to everybody who had the price to pay for them, and thousands of passengers who never were numbered among what we call traveling salesmen availed themselves of the opportunity to buy these mileage books at the wholesale rates, not only as a matter of economy, but as a matter of convenience.

Mr. BUTLER. Members of Congress availed themselves of that privilege.

Mr. BARKLEY. Of course, and so do many thousands of others.

Representative Newton (Minnesota), June 29, 1922, said (Cong. Rec., vol. 62, pt. 9, p. 9717):

> The bill before us authorizes and directs the Interstate Commerce Commission to issue what is known as interchangeable mileage books or scrip coupon tickets at reasonable rates to be good for passenger carriage on all carriers subject to the interstate commerce act, with such exceptions as the Interstate Commerce Commission shall find to be advisable owing to dissimilarity of conditions and circumstances.
>
> Before the war it was customary for groups of railroads to issue what came to be known as interchangeable mileage books. In general their use was confined to the traveling salesman, of whom there are possibly 750,000 in this country. The purchaser bought, say, a 3,000-mile book and paid for it at the time of its purchase. If his trip was 100 miles the conductor upon the presentation of the book tore off 100 miles and returned the book with the rest of the mileage to the traveler. Purchasing in wholesale quantities, so to speak, a discount was obtained below the prevailing rate, and then in addition to this advantage the traveler did not have to waste time purchasing a ticket at every station.
>
> The mileage books were in general use throughout the West, but were not good on all roads. In fact, in accordance with my own observation, they were interchangeable on not to exceed some five or six roads.
>
> The war and the taking over of the roads by the Government ended the issuance of

mileage books. After the return of the roads an effort was made to have the railroads reinstate the custom of issuing interchangeable mileage books. The matter was presented to the Interstate Commerce Commission, who questioned their authority to order the roads to do so. This movement was led by the various organizations of commercial travelers and they then presented the matter to Congress. Several bills were introduced in both Houses; some of them called for a universal interchangeable book at a flat rate of so much per mile. It was readily seen that this could not very well be done. In the first place, this would be the direct fixing of a rate by Congress. If this was once commenced there would be no end to it. From a practical standpoint, Congress is not fitted to be a rate-making body. It will be remembered that the previous interchangeable books were not universally interchangeable, but only so in restricted territory where conditions were the same. The present general rate is 3.6 per mile. Some of the short lines charge a higher rate, and in the western mountain country I am informed that the rate sometimes is above 5 cents per mile. Obviously it would not be fair to issue an interchangeable book and have it presented in mountain territory where the rate is 5 cents and the traveler purchased the mileage in the East at, say, 3 cents.

It was then determined to agree upon a bill which would authorize the Interstate Commerce Commission to issue the books at reasonable rates under rules and regulations and

subject to exceptions. Such a bill passed the Senate, and with several amendments the same bill is now before the House. The principal amendments are these: First, we authorize the commission to issue mileage books or scrip coupon tickets as they may think advisable. The representative of one of the large commercial traveler organizations was of the opinion that the scrip plan was the better one. Such a plan could be made universal. Under the mileage-book plan the purchaser would buy 3,000 miles at so much per mile. Under the scrip plan he would buy so many dollars' worth of transportation at whatever cost per mile the company to whom he presented the scrip would charge. There are some advantages in the scrip plan; there are others in the mileage plan. It is claimed that the scrip method could be more easily used by scalpers. For these reasons the committee thought it better to put the whole proposition up to the commission.

To take care of some roads where, owing to mountainous regions or other circumstances, it would be inequitable to sell interchangeable mileage books good on those roads, we have authorized the commission to exempt certain roads from the operation of the act.

When the bill came from the Senate the mileage book so issued would be "good for interstate passenger carriage" only. This would be of little benefit to the commercial traveler.

Of the great bulk of commercial travelers, most of their trips are from town to town,

which would be an intrastate carriage. The mileage book would not be valid for such carriage. For example, the ordinary commercial traveler in Minnesota, the Dakotas, and Montana will travel for several weeks before crossing a State line. Some of them have their territory wholly within a State. If the Senate bill becomes a law, Mr. Smith, getting on the train at Minneapolis and going to Fargo, N. Dak., could use his mileage book, and if that book was purchased at a discount his fare to Fargo would be less than the regular fare to the extent of the discount. Mr. Jones, on the other hand, who took the same train and who sat with him during the entire journey, is getting off at Moorhead, just across the river from Fargo. Moorhead is in Minnesota. Jones's mileage book could not be used for his trip. He would have to buy a ticket, and if there was a discount in the interstate business, he would not get the benefit of any discount on his trip, which was purely intrastate. Hence the committee amendment to strike out "interstate."

It will be observed that these books are to be issued at reasonable rates and under such reasonable rules and regulations as the public interest demands. This makes them available to anyone deeming that method advisable and having the necessary funds with which to purchase transportation at wholesale.

Mr. Chairman, the gentleman from Kentucky (Mr. Barkley) called attention to the authorization and direction to issue "interchangeable mileage or scrip coupon tickets."

He inquired as to whether use of the disjunctive "or" would restrict the commission to either mileage books or scrip and not permit them to issue both if in their judgment that should be deemed advisable. It is my own impression—others on the committee I find agree with me—that the language is clear and that as it now reads the commission would have the authority to direct the issuance of either or both.

Representative Denison (Illinois), June 29, 1922, said (Cong. Rec., vol. 62, pt. 9, p. 9718):

The Clerk then reported the following amendment:

"Page 2, line 4, at the beginning of the line strike out the word 'interstate.'"

Mr. DENISON. Mr. Chairman, I desire to be heard upon that committee amendment. The Members seem to be very impatient, and perhaps do not approve of anyone saying anything either for or against this bill. Several are calling for a vote, but I am going to take up just a moment to state my opposition to this particular committee amendment. It may not have any influence upon a single person in the House, but we have been criticized very severely of late for "passing the buck," as it is called, to the Supreme Court, for passing laws which the Supreme Court promptly holds unconstitutional. I hesitate to rise in the House and object to a bill, or any part of a bill, upon the ground that I think it is unconstitutional. When I first came here I used to be very prompt to do so,

but the longer I stay here the more I hesitate to object to any bill upon the ground that it is unconstitutional. Such objection seems to be looked upon with amusement and not taken seriously. Nevertheless, I am going to record my view upon this question involved in the committee amendment on line 4, wherein the word "interstate" is stricken out.

This bill, as it came from the Senate, applied only to interstate passenger carriage upon the theory that Congress has no jurisdiction to regulate in the manner provided in this bill purely intrastate passenger rates. That has been my view all along. It was clearly the view of the Senate.

* * * * *

I would like to say one or two things more before my five minutes are up, as the time now has been limited. In other words, to accomplish the purposes of this act we are going far beyond the power conferred upon the commission by the transportation act.

The purpose of this act is to reduce fares to certain classes of persons and under certain conditions. Such a purpose is not in harmony with or included in the provisions of the transportation act for preventing discriminations between persons or localities or an undue burden upon interstate commerce. Now, I think, gentlemen, that this bill goes beyond any power heretofore conferred upon the Interstate Commerce Commission in any act of Congress, and that it goes beyond our power under the commerce clause of the Constitution. I think that striking out that word "inter-

state" will render this act invalid if the railroads contest it. I think in the interest of the traveling salesmen, who want this legislation, and all others we would be doing them a favor to put that word back in the act and leave it like the Senate had it. No one interested in this bill asked the committee to make this amendment.

Mr. WALSH. Mr. Chairman, will the gentleman yield?

Mr. DENISON. Yes.

Mr. WALSH. Is not the word "interstate" merely descriptive of the sort of transportation that the public is paying for—this passenger traffic going from one State to another?

Mr. DENISON. The act as it passed the Senate and came to us limited the use of these interchangeable mileage books to interstate tickets or carriage, and in that form I think it was valid. But the committee thought it wise to strike out that word "interstate" and I think that will render the act invalid. The railroads may never contest it. But if they do, I think this committee amendment will destroy the validity of the act.

* * * * *

Mr. Chairman, I think there should be interchangeable mileage books issued by all the railroads, and I am willing to authorize the commission to compel the railroads to issue such books if it can be done under any proper exercise of our constitutional powers. I think, however, that by striking out the word "interstate" the committee has used bad judgment and has made this bill unconstitutional, even if it was constitutional in other respects.

The CHAIRMAN. The Clerk will report the next committee amendment.

The Clerk read as follows:

"Page 2, line 5, after the word 'act' insert 'The commission may in its discretion exempt from the provisions of this amendatory act either in whole or in part any carrier where the particular circumstances shown to the commission shall justify such exemption to be made.'"

Mr. COOPER of Wisconsin. Mr. Chairman, I would like to ask the chairman of the committee why that particular amendment was inserted in the bill. It is one of exceeding importance. It would permit the commission to exempt from the provisions of this act, an amendatory act, an entire railroad, in its discretion. Why should it be possible for that commission to exercise discrimination as between railroads in a matter so important as this?

Mr. WINSLOW. The theory is this, that the scale of prices for carrying a passenger a mile vary now under the regulations of the Interstate Commerce Commission from 3.6 cents per mile, as a minimum, up to 5 cents or 6 cents a mile, and above, I think, in some instances. Now, it might be, if the commission saw fit to get out a mileage book, that they could get out one covering the great majority of the railroads of the country at 3.6 cents per mile, but other railroads could not afford to carry passengers at that price. So, in order to get out a mileage book, in case they saw fit to order the issue of one, we

provided that they could indicate the roads upon which the general mileage rate would be acceptable, profitable. As some other roads could not carry at the same rate per mile, we realized there should be a right for the commission to make exemptions. Hence this provision.

The CHAIRMAN. The question is on agreeing to the committee amendment.

The committee amendment was agreed to.

O

In Equity No. 469.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellants,
v.
THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL., Appellees.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

P. J. FARRELL,
For Interstate Commerce Commission,
Appellant.

DECEMBER, 1923.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1924

SUBJECT INDEX.

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TABLE OF CASES CITED.

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BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT.

This is an appeal from a final decree of the District Court of the United States for the District of Massachusetts, annulling and setting aside an order of the Interstate Commerce Commission dated March 6, 1923, which, in part, reads as follows:

> *It appearing*, That on January 26, 1923, the Commission entered its report in the above-entitled proceeding, containing its findings of fact and conclusions thereon, and further hearing having been had with respect to the rules and regulations which shall govern the issuance and use of the interchangeable scrip coupon ticket described in said report; and the Commission having, on the date hereof, made and filed its supplemental report containing its further findings of fact and conclusions there-

on, which report and the said report of January 26, 1923, are hereby referred to and made a part hereof:

It is ordered, That the respondents hereinafter named be, and they are hereby, notified and required to establish, issue, maintain, and, on and after May 1, 1923, keep in force, upon notice to this Commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, a nontransferable interchangeable scrip coupon ticket in the denomination of $90, which shall be sold at a reduction of 20 per cent from the face value of the ticket, good within one year from the date of its sale for the carriage of passengers on all passenger trains operated by said respondents, except that in the case of special or extra-fare trains its use shall be subject to the payment in cash by the passenger of the special or extra fare, and except in so far as hereinafter specifically exempted: (Rec. 54–55.)

* * * * *

It is further ordered, That the issuance and use of said interchangeable scrip coupon ticket shall be governed by the rules and regulations set out in Appendix D to said supplemental report. (Rec. 58.)

In support of its conclusion that the rate of fare to be applied to the class of transportation covered by the order should be 20 per cent less than the standard fare of 3.6 cents per mile, the Commission said:

* * * We further find that the rates resulting from that reduction will be just

and reasonable for this class of travel. * * *. (Rec. 28.)

In stating facts upon which it based its conclusion of reasonableness, the Commission, among other things, further said:

> The amendment to the act pursuant to which this proceeding was instituted does not upon its face indicate upon what basis an interchangeable mileage or scrip ticket should be issued. The spirit and the apparent theory of the law is that carriers shall be required to sell such a ticket at something less than the standard fare, which would be just and reasonable because it would be sold in such quantities as to stimulate travel, and thereby increase net revenue or at least offset any loss in revenue that might result from the reduction in which event carriers would render greater service to the public. It is a well-recognized rule in trade and commerce that, other things being equal, as the price of an article is lowered the sales increase. And the fact that for many years prior to Federal control carriers voluntarily sold mileage books at discounts ranging from 10 to 33⅓ per cent is not without significance. That commutation and excursion fares create traffic is conceded by carriers. That some additional traffic would be created by a scrip ticket at reduced fares may fairly be assumed, although it is impossible to determine how much. Many unused coupons would not be redeemed while others which remained in the book near the end of the year or season would undoubtedly be used for passenger

travel that would not otherwise occur. A scrip ticket at reduced fares could not be justified solely upon the theory that the cost per passenger-mile might thereby be reduced, although it is apparent that anything that will tend to cause a fuller utilization of passenger-train facilities without overcrowding will also tend to reduce the average cost per passenger-mile.

If carriers are to be required to issue a mileage or scrip coupon ticket at a reduced fare it must be mainly upon the assumption that travel will be stimulated thereby. The question whether the mileage or scrip coupon ticket at reduced fare will stimulate travel sufficiently to increase or to equalize any loss in revenue that might result must remain in the realm of speculation until and unless such a ticket is established and experience recorded. The evidence neither proves the affirmative nor the negative of the question whether the mileage book used in the past stimulated travel and whether reductions in fares increased the number of revenue passenger-miles. The evidence as to the use of the mileage books is too indefinite to be helpful, or to afford a guide in determining for the future the question whether a scrip ticket at a reasonable fare below the standard fare would increase or decrease carriers' revenues. The testimony of merchants, manufacturers, and commercial travelers is to the effect that an interchangeable mileage ticket at reduced fares would result in a greater number of salesmen being put on the road. And, of course, the use of such

> a ticket would not be restricted to commercial travelers and business men. It would be open to all. In addition to the obvious spirit of the law, the record warrants the view that a coupon ticket at a reasonably reduced fare should be established, at least for an experimental period. In no other way can the apparent purpose of the law be given practical effect. (Rec. 27–28.)

The order of March 6, 1923, was made and entered by the Commission for the purpose of complying with requirements contained in paragraph (2) of section 22 of the interstate commerce act, as amended by an act approved August 18, 1922. The language of said paragraph is:

> The commission is directed to require, after notice and hearing, each carrier by rail, subject to this Act, to issue at such offices as may be prescribed by the commission interchangeable mileage or scrip coupon tickets at just and reasonable rates, good for passenger carriage upon the passenger trains of all carriers by rail subject to this Act. The commission may in its discretion exempt from the provisions of this amendatory Act either in whole or in part any carrier where the particular circumstances shown to the commission shall justify such exemption to be made. Such tickets may be required to be issued in such denominations as the commission may prescribe. Before making any order requiring the issuance of any such tickets the commission shall make and publish such reasonable rules and regulations for their issuance

> and use as in its judgment the public interest demands; and especially it shall prescribe whether such tickets are transferable or non-transferable, and if the latter, what identification may be required; and especially, also to what baggage privileges the lawful holders of such tickets are entitled.

There were two hearings before the Commission, the first of which was followed by the Commission's report of January 26, 1923, which is Exhibit C to the petition, (Rec. 18) and from which we have already quoted, and the second of which resulted in the prescribing by the Commission of rules and regulations in accordance with the requirements of said paragraph (2). Concerning the rules and regulations, however, appellees make no complaint.

Reasons advanced by appellees, in support of their contention that the order of March 6, 1923, is unlawful and void, may be summarized as follows:

1. The Commission's conclusion that the rate of fare named in the order will be just and reasonable is not supported by other findings of fact reported by the Commission.

2. Said rate of fare requires appellees to perform services at rates which are noncompensatory, unreasonable, unjustly discriminatory, and unduly preferential and prejudicial, and therefore in violation of the Fifth Amendment to the Constitution, and of sections 1, 2 and 3 of the interstate commerce act.

3. The Commission based its order upon an erroneous interpretation of section 22 of said act.

4. The order is experimental, arbitrary, and unreasonable, and will not enable the Commission to obtain the information it desires to secure.

5. The order is in conflict with the duty imposed upon the Commission by section 15a of the interstate commerce act to initiate, modify, establish and adjust rates which will furnish to carriers a fair return upon the aggregate value of the properties held and used by them in the service of transportation.

6. The order requires the establishment of the relation of principal and agent and creditor and debtor between carriers without their consent.

7. The order requires carriers to transport passengers for less than the standard fare of 3.6 cents per mile.

8. The order permits carriers exempted by the Commission from the terms of the order to determine for themselves whether they shall become subject to the provisions of said amendatory act of August 18, 1922.

9. The order applies to the transportation of passengers wholly within one State.

The assignments of error, filed on behalf of the United States and the Commission, are seven in number and may be summarized as follows:

1. The court erred in issuing the permanent injunction.

2. The court erred in holding that there is no finding in the record that would indicate that the Commission would have ordered the scrip coupons to be issued at reduced rates

of fare, "if it had exercised an independent judgment apart from what it conceived to be the plain spirit and theory of the amendment" of August 18, 1922.

3. The court erred in holding that, "It is not entirely clear whether the majority of the Commission acted under an interpretation of the amendment that it was mandatory upon them so to reduce the rates for interchangeable scrip coupon tickets, or upon an assured desire of the Congress, though not expressed by the amendment in mandatory form, that they should so do."

ARGUMENT.

I.

THE COMMISSION IS NOT, AS A MATTER OF LAW, REQUIRED TO REPORT THE MINOR FACTS UPON WHICH ITS CONCLUSIONS OF FACT ARE BASED.

A subdivision of Paragraph X of the petition reads as follows:

> None of the findings of fact made by the Commission supports the formal finding and conclusion that, even for the experimental period of at least one year referred to in the report of the Commission, a reduction of 20 per cent to purchasers of scrip coupon tickets would result in just and reasonable passenger fares and most, if not all, of said findings strongly negative such conclusion. (Rec. 7.)

The statements contained in this subdivision appear to be based upon the assumption that it is the duty of the Commission to report the minor facts

upon which its conclusions of fact are based, but the contrary of this proposition is correct. The duty imposed upon the Commission in this connection is shown by paragraph (1) of section 14 of the interstate commerce act, which reads:

> That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

This court called attention to the distinction between reparation and other cases in its decision in *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, wherein it said:

> * * * The 1906 amendment, in modifying section 14 so as to dispense with the necessity of formal findings of fact except in cases where damages (or reparation) are awarded, and sections 15 and 16 so as to give a greater effect than before to the orders of the Commission other than those requiring the payment of money, renders it not less but more appropriate that, so far as practicable, all pertinent objections to action proposed by the Commission and the evidence to sustain them shall first be submitted to that body. * * *. (Id. 489–490.)

It is therefore apparent that, even if the conclusions set forth in the subdivision of the petition

referred to were correct, they would not justify a decree of the court annulling and setting aside the Commission's order. That the conclusions are not correct, however, we believe to be clearly indicated by matters to which we will call attention under the next heading.

II.

THE ORDER OF MARCH 6, 1923, DOES NOT REQUIRE APPELLEES TO PERFORM SERVICES FOR A RATE OF FARE WHICH WILL BE NONCOMPENSATORY OR COMPEL THEM TO ESTABLISH AND MAINTAIN A RATE OF FARE WHICH WILL BE UNREASONABLE, UNJUSTLY DISCRIMINATORY, OR UNDULY PREFERENTIAL AND PREJUDICIAL.

Counsel for appellees seems to base his contention that the rate of fare prescribed by the order is noncompensatory upon the Commission's finding that for Class I steam roads for the year 1921 the operating ratio for passenger service was 85.24, but, as hereinbefore shown by quotations from its report, the Commission proceeded upon the theory that the issuance and sale of the scrip coupon ticket will increase the passenger business of the petitioners and other carriers to an extent sufficient to offset, and more than offset, any loss in revenue which would otherwise result from a reduction in the rate of fare. We feel certain that when the court considers the action taken by the Commission in making the order in connection with what the Commission said in its report of January 26, and its supplemental report of March 6, it will readily conclude that the Commission would not have made the order if it had not been convinced that compliance therewith would bring

about an increase in the passenger business of the carriers and a reduction in the per unit cost to them of that business, and result in a benefit to both the carriers and the general public. If this view of the Commission proves to be correct, it is evident that the contention that the rate of fare specified in the order is noncompensatory will have no foundation upon which to rest.

As already shown by us, the Commission found that the rate of fare prescribed by the order will be just and reasonable for the class of traffic to which it is to be applied, and this finding is binding upon the court if it is based upon substantial evidence.

We do not find in the petition any allegation to the effect that the Commission's finding of reasonableness is not supported by the evidence included in the record which was made in the proceedings before the Commission upon which the order of March 6 is based, but, as hereinbefore shown, appellees contend that said finding is not supported by other findings of fact set forth in the Commission's reports of January 26 and March 6, 1923.

In addition to findings of the Commission to which we have already called attention, the Commission stated that the average number of passengers per train, which in 1916 was only 57, increased gradually thereafter until in 1919 it was 82, but decreased rapidly after the standard rate of fare was increased to 3.6 cents per mile in 1920, until for the first six months of 1922 it was only 60; that during the same time the average number of passengers per car,

which in 1916 was 16, increased gradually until in 1919 it was 21, but for the first six months of 1922 was only 15; that the revenue passenger miles which in 1916 totaled 34,586,000,000, increased gradually thereafter until in 1920 they were 46,849,000,000, but for the first six months of 1922 were only 16,-487,000,000; that the carriers now have in effect commutation, convention, excursion, and summer and winter, fares, which are less in each instance than the standard fare; that the carriers now have in effect an interchangeable scrip coupon ticket, in denominations of $15, $30, and $90, which they sell at the standard rate of fare of 3.6 cents per mile, and that there is evidence in the record which was made before the Commission to the effect that carriers now sell tourist, and summer and winter excursion tickets at rates of fare which are 33⅓ per cent less than said standard rate of fare. (Rec. 22.)

It is a fair assumption that the carriers would not have made the reductions mentioned if they had not been of opinion that the reductions would result in a benefit to them. What they are doing now in making reductions is, of course, based upon the experience they have had in the past in connection with reductions, and is therefore much better evidence of the result they believe will follow the reduction the Commission is requiring them to make than would be any estimates they might make for the purpose of escaping control by the Commission in the premises.

Action taken by it in making the order indicates that the Commission was unable to agree with wit-

nesses of the carriers who expressed the opinion that if a rate of fare less than the standard fare were applied to the class of traffic covered by the order a reduction in the net revenues of the carriers would be the inevitable result, but it is also true that the Commission agreed only partially with witnesses who testified in support of the application for the establishment of a reduced rate of fare. In its report of January 26, the Commission, among other things, said:

> Certain witnesses stated that there was a substantial falling off in the number of commercial salesmen on the road during 1921 and during the first six months of 1922 as compared with 1920. They attribute this to the high passenger fares established as a part of the general increases of August, 1920; and say that many salesmen who operate on a commission basis and many mercantile houses refrained during those periods from inaugurating road trips because of the high passenger fares. (Rec. 25.)

With the conclusion thus stated the Commission agreed only to the extent of saying:

> * * * The passenger fare was undoubtedly a contributing cause, but it is contrary to the evidence to say it was the only or even the chief cause. * * *. (Rec. 25.)

That the decree of the lower court was not based upon any insufficiency of evidence in the record which was made in the proceedings before the Com-

mission is plainly indicated by the opinion of that court, from which we quote as follows:

> Although the carriers opposed any reduction in rates for the scrip coupons below the standard rates, it is clear from the record that the Commission proceeded on the assumption that the spirit and theory of the congressional amendment required them to order the scrip coupons to be issued at reduced rates, at least in so far as such rates could not be deemed confiscatory. There is no finding in the record that would indicate that the Commission, if it had exercised an independent judgment, apart from what it conceived to be the plain spirit and theory of the amendment, would have ordered the scrip coupons to be issued at reduced rates. The only finding of the Commission that could possibly be relied upon as indicating that the Commission exercised an independent judgment is the statement in the majority report that:
>
> "In addition to the obvious spirit of the law, the record warrants the view that a coupon ticket at a reasonably reduced fare should be established, at least for an experimental period."
>
> But this finding is followed by the statement that:
>
> "In no other way can the apparent purpose of the law be given practical effect."
>
> It would seem fairly plain, therefore, that the furthest the Commission goes in its finding is to conclude that the record might justify

> the issuance of coupons at reasonably reduced rates for an experimental period; but there is nothing to indicate that the Commission, if it had felt free to exercise its own judgment, would have assumed the responsibility for establishing the reduced rate, even for an experimental period. (Rec. 91–92.)

We respectfully submit that the interpretation by the lower court, above shown, is not justified by the language of the Commission to which that court referred. It will be observed that the Commission stated that its finding of reasonableness was based upon matters other than "the obvious spirit of the law."

In speaking of the construction placed by the Commission upon the amendment of August 18, the lower court further said:

> It is not entirely clear whether the majority of the Commission acted under an interpretation of the amendment that it was mandatory upon them so to reduce the rates for interchangeable scrip coupon tickets, or upon an assumed desire of the Congress, though not expressed by the amendment in mandatory form, that they should so do. * * * (Rec. 92.)

In this connection, however, the lower court did not refer specifically to any statement made by the Commission, and we are unable to find, either in the Commission's report of January 26 or its report of March 6, anything which appears to us to indicate that the Commission was of opinion that the amend-

ment of August 18 required it to prescribe for use in connection with the scrip coupon ticket covered by the order of March 6 any rate of fare other than such as it might, after hearing and investigation, find to be just and reasonable in the premises.

Appellees' contention that the order requires them to establish and maintain a rate of fare which will be unjustly discriminatory and unduly preferential and prejudicial appears to be based upon the view that, as a matter of law, the Commission may not classify separately the passenger traffic under consideration and apply to it a rate of fare less than the standard fare. Making classifications, however, is one of the administrative duties imposed upon the Commission by the interstate commerce act. Carriers also are continually exercising judgment and taking action in this connection. And that the making of classifications is something which necessarily involves the making of discriminations is a proposition that no one acquainted with the facts will attempt to deny. Every freight classification discriminates as between the different classes of freight traffic, but such discriminations are not necessarily unjust. Whether such injustice exists, as a fact, in a particular case, is a matter to be determined by the Commission, subject to review in court for the purpose only of determining whether, in reaching a conclusion in the premises, the Commission has acted beyond the power duly conferred upon it by the law under which it operates.

In making the classification involved in this particular case, the Commission simply complied with the mandate of Congress contained in the amendatory act of August 18, 1922. It is therefore obvious that members of Congress were of opinion that the passenger traffic to which the scrip coupon ticket is to be applied should be classified separately from other passenger traffic, and with this view it must be assumed that carriers, including appellees, agree, because, as hereinbefore shown, they now have in effect an interchangeable scrip coupon ticket which is practically identical with the scrip coupon ticket mentioned in the Commission's order. The contentions of appellees, though, are not predicated upon the fact that a separate classification has been made, but are based instead upon the fact that a rate of fare has been prescribed in connection with the classification which is less than the standard fare of 3.6 cents per mile.

By the amendatory act mentioned, Congress did not require the Commission to prescribe in connection with the scrip coupon ticket a rate of fare which would be less than the standard fare, but a statement that Congress did not expect the Commission to do so would not harmonize very well with matters of which the court will take judicial notice.

Congress must have known that at the time of the passage of the amendatory act the carriers had in force an interchangeable scrip coupon ticket practically identical with the scrip coupon ticket provided for in the act, and that in connection with the use of

such ticket the carriers were exacting the standard fare. Congress must have known, also, that at the time of the passage of the amendatory act carriers were applying to passenger traffic classified by them as commutation, convention, and excursion, including summer and winter excursions, rates of fare substantially less than the standard fare. Under these circumstances it does not seem reasonable to assume that Congress would have passed the amendatory act if it had not expected the result to be a separate classification of passenger traffic to which a rate of fare less than the standard fare would be applied. It did not itself prescribe the rate of fare, because it wished to obtain, in that connection, the judgment of its agent, the Interstate Commerce Commission. We find it difficult to understand why discriminations in rates of fare as applied to different classes of passenger traffic should be regarded as just and lawful when voluntarily practiced by carriers, but be regarded as unlawful and void when required by orders of a regulating tribunal which has jurisdiction over the carriers and the traffic covered by the orders.

In its report of January 26, the Commission said:

> * * * The spirit and apparent theory of the law is that carriers shall be required to sell such a ticket at something less than the standard fare, which would be just and reasonable because it would be sold in such quantities as to stimulate travel, and thereby increase net revenue or at least offset any loss in revenue

> that might result from the reduction, in which event carriers would render greater service to the public. (Rec. 27.)

And, based upon these statements, counsel for the appellees contends that the Commission interpreted erroneously the amendatory act of August 18, 1922. In what we have already said, however, we think a sufficient answer to this contention has been made. The Commission does not, of course, contend that the amendatory act should be interpreted in a manner which will do violence to the language therein contained, but expressing an opinion that Congress expected the Commission to prescribe, in connection with the separate classification Congress had required the Commission to make, a rate of fare which would be less than the standard fare of 3.6 cents per mile, is not the equivalent of such an interpretation.

Counsel for appellees further contends that the rate of fare prescribed by the order of March 6, is arbitrary and unreasonable because experimental in character, but a like contention could consistently be advanced in connection with every order made by a regulating tribunal for the purpose of controlling action to be taken by carriers in the future. When carriers, for the purpose of increasing their passenger business and net revenues, first began to prescribe rates of fare less than their standard fares to induce summer and winter tourists to travel between points in the east and points in the west, between points in the north and points in Florida, between points in the United States and points in

Canada, etc., they necessarily experimented, and the reduced rates of fare they now have in effect, and apply to the special classes of traffic mentioned, undoubtedly result from the information obtained by the carriers in making such experiments.

The Commission stated frankly that it could not be certain that the result of establishing and maintaining in force the interchangeable scrip coupon ticket provided for in its order of March 6 would be what it hopes for and expects, but it expressed a willingness to reconsider the subject matter of the order after it shall have been in force for a comparatively short period of time. In this connection the Commission said:

> * * * Any party to this proceeding may bring the matter to our attention for further consideration on or about January 1, 1924, with such statements as they choose to make concerning the operation and effect of the scrip tickets. (Rec. 28.)

However, counsel for the appellees insists that the maintenance in force of the scrip coupon ticket will not enable the Commission to obtain the information it desires to secure. If this be true, it necessarily follows, we submit, that the estimates of the carriers' witnesses contained in the record made before the Commission in connection with the matters now under consideration should be entirely disregarded, because those estimates are based by them upon experiences they have had in the past. However, we do not believe this view is correct. We have shown that

the carriers now have in effect an interchangeable scrip coupon ticket in denominations of $15, $30, and $90, and concerning it, the Commission, among other things, said:

> * * * The revenue from its sale is estimated to represent about 1 per cent of the total passenger revenue. * * *. (Rec. 24.)

If the scrip coupon ticket prescribed by the order of March 6, is maintained in force for a certain period of time, and at the end of that period of time it is shown that the revenue derived from its sale by the carriers has increased from the present 1 per cent to 20 per cent, and that meanwhile there has been no decrease in the revenues derived by the carriers from other classes of passenger traffic, that will be persuasive evidence that the maintenance of the lower rate of fare has resulted in a material increase in the passenger business of the carriers.

III.

THE ORDER OF MARCH 6 IS NOT IN CONFLICT WITH THE DUTY IMPOSED UPON THE COMMISSION BY SECTION 15a OF THE INTERSTATE COMMERCE ACT.

Two subdivisions of Paragraph XVII of the petition read as follows:

> The aforesaid order of the Commission of March 6, 1923, is unlawful and void in violation of Section 15a of the Interstate Commerce Act, which requires the Commission to initiate, modify, establish and adjust rates so that the carriers as a whole or in each of such rate groups as the Commission may from time to

time prescribe, will, under honest, efficient and economical management and reasonable expenditures for maintenance of way and structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation.

* * * * *

The Commission, in requiring such large reductions in net railway operating income at a time when the carriers were not and are not earning the rate of return prescribed on the valuation established by the Commission, disregarded the provisions of the Interstate Commerce Act requiring it to establish such rates that the carriers of the Eastern group would earn an aggregate annual net railway operating income equal as nearly as may be to 5.75 per cent upon the aforesaid aggregate value of the railway property of such carriers held for and used in the service of transportation, and acted beyond the scope of power delegated to it by said Act. (Rec. 10–11.)

The views contained in these subdivisions appear to be based upon the conclusion of appellees that compliance by them with the order of March 6 will result in a decrease in their net revenues from passenger traffic, but we think matters to which we have called the attention of the court indicate clearly that the Commission would not have made the order if it had not been convinced that com-

pliance with its terms would increase the passenger business of the appellees and other carriers to an extent sufficient to offset, and more than offset, any loss in revenue which would otherwise result from a reduction in the rate of fare.

In a case like the one under consideration here, where the evidence is necessarily of such a character as to justify differences in opinion, the court will not substitute its judgment for the judgment of the Commission as to an administrative matter within the Commission's jurisdiction. It will refrain from interfering until after opportunity has been afforded for a proper test in the premises. A question identical in principle with the one we are now discussing was before this court in *Willcox* v. *Consolidated Gas Company*, 212 U. S. 19, and, in declining to enjoin the enforcement of an order of the Public Service Commission of New York, the court said:

> In this case a slight reduction in the estimated value of the real estate, plants and mains, as given by the witnesses for complainant, would give a six per cent return upon the total value of the property as above stated. And again, increased consumption at the lower rate might result in increased earnings, as the cost of furnishing the gas would not increase in proportion to the increased amount of gas furnished.
>
> The elevated railroads in New York when first built charged ten cents for each passenger, but when the rate was reduced to five cents it is common knowledge that their receipts

were not cut in two, but that from increased patronage the earnings increased from year to year, and soon surpassed the highest sum ever received upon the ten cent rate.

Of course, there is always a point below which a rate could not be reduced and at the same time permit the proper return on the value of the property, but it is equally true that a reduction in rates will not always reduce the net earnings, but on the contrary may increase them. The question of how much an increased consumption under a less rate will increase the earnings of complainant, if at all, at a cost not proportioned to the former cost, can be answered only by a practical test. In such a case as this, where the other data upon which the computation of the rate of return must be based, are from the evidence so uncertain, and where the margin between possible confiscation and valid regulation is so narrow we can not say there is no fair or just doubt about the truth of the allegation that the rates are insufficient. (Id. 50–51.)

IV.

THE ORDER OF MARCH 6 IS NOT INVALID BECAUSE IT REQUIRES CARRIERS TO ESTABLISH BETWEEN THEMSELVES, WITHOUT THEIR CONSENT, THE RELATION OF PRINCIPAL AND AGENT AND CREDITOR AND DEBTOR.

In Paragraph XIX of their petition, appellees contend that the order of March 6 is unlawful and void, first, because "it requires the establishment of the relation of principal and agent and creditor and debtor, between carriers without their consent and requires one carrier to furnish transportation

upon the credit of another carrier," and, second, because "it also requires the carriers issuing scrip coupon tickets over whose lines no part of the transportation is used to perform substantial accounting and other services without compensation therefor." (Rec. 12.)

Contentions similar to these were made in *Atlantic Coast Line Railroad Company* v. *Riverside Mills*, 219 U. S. 186. That case involved the amendment of June 29, 1906, to section 20 of the interstate commerce act, known as the Carmack amendment, which made the initial carrier liable for injuries resulting from loss of or damage to property while being transported, regardless of whether the loss or damage occurred upon the line of the initial carrier or upon the line of one of its connections, but gave the initial carrier a right to collect in turn such sum of money as it might be required to pay in damages from the connecting carrier if the loss or damage occurred on the line of the latter. For reasons similar to those now advanced by appellees, the Atlantic Coast Line contended that the Carmack amendment was unconstitutional, and in holding this contention to be unsound, this court, among other things, said:

> That a situation had come about which demanded regulation in the public interest was the judgment of Congress. The requirement that carriers who undertook to engage in interstate transportation, and as a part of that business held themselves out as receiving packages destined to places beyond their own

terminal, should be required as a condition of continuing in that traffic to obligate themselves to carry to the point of destination, using the lines of connecting carriers as their own agencies, was not beyond the scope of the power of regulation. The rule is adapted to secure the rights of the shipper by securing unity of transportation with unity of responsibility. The regulation is one which also facilitates the remedy of one who sustains a loss, by localizing the responsible carrier. Neither does the regulation impose an unreasonable burden upon the receiving carrier. The methods in vogue, as the court may judicially know, embrace not only the voluntary arrangement of through routes and rates, but the collection of the single charge made by the carrier at one or the other end of the route. This involves frequent and prompt settlement of traffic balances. The routing in a measure depends upon the certainty and promptness of such traffic balance settlements, and such balances have been regarded as debts of a preferred character when there is a receivership. Again the business association of such carriers affords to each facilities for locating primary responsibility as between themselves which the shipper can not have. These well-known conditions afford a reasonable security to the receiving carrier for a reimbursement of a carrier liability which should fall upon one of the connecting carriers as between themselves. (Id. 203–204.)

In this connection, pertinent language of the lower court was as follows:

> The amendment itself is attacked as unconstitutional, in that in requiring the interchangeable scrip coupons it compels an interchange of credit between the railroads and thereby compels a service at the risk of complete financial loss in case of the insolvency of the road from which the scrip may have been purchased. In our judgment, the decisions of the Supreme Court upholding the Carmack Amendment (*Atlantic Coast Line R. R. Co.* v. *Riverside Mills*, 219 U. S. 186, * * *) the right of a legislature to compel the interchange of cars (*Michigan Central R. R. Co.* v. *Michigan R. R. Commission*, 236 U. S. 615, * * *) and of Congress to compel the establishment of joint rates (*St. Louis Southwestern Ry. Co.* v. *U. S.*, 245 U. S. 136, * * *) necessarily involve the determination of the right to compel an interchange of credits as between the roads despite the possible loss from such an insolvency. As the Commission points out, the railroads themselves have maintained the interchangeable scrip coupons established under government operation, and have thus voluntarily established a similar interchange of credits over all roads except electric and short-line carriers. Under the present amendment, the extent of such credit interchange is left to the Commission, and must, of course, be reasonable; but in requiring the interchange in respect to the scrip coupons, the action of Congress must be upheld as a constitutional

exercise of power within the aforesaid decisions. (Rec. 93.)

If the power to regulate interstate and foreign commerce and the instrumentalities thereof were to be confined within limits as narrow as those suggested by the two subdivisions of Paragraph XIX of the petition above quoted, it is apparent that the effort of Congress, shown in amendments to the interstate commerce act contained in the transportation act, to assist in building up and maintaining an adequate national railway transportation system, primarily for the accommodation of interstate and foreign commerce, but incidentally also for the accommodation of intrastate commerce, would at the most result in only a partial success.

V.

THE ORDER OF MARCH 6 IS NOT RENDERED INVALID BECAUSE THE INTERCHANGEABLE SCRIP COUPON TICKET PROVIDED FOR THEREIN APPLIES TO TRANSPORTATION REGARDLESS OF THE EXTENT TO WHICH THE TICKET MAY BE USED ON A PARTICULAR LINE.

A sentence appears in Paragraph XX of the petition, which reads as follows:

> The aforesaid order of the Commission of March 6, 1923, is unlawful and void because it requires a carrier to accept scrip coupon tickets issued by itself or another carrier in payment for a single journey irrespective of the length of that journey and irrespective of the fact that the holder of the scrip coupon ticket may use the scrip coupon ticket for no other journey over the line of the carrier in question. (Rec. 12.)

This seems to us to indicate that counsel for the appellees leaves entirely out of view the effort of Congress above mentioned to build up and maintain a national railway transportation system as distinguished from individual railroads.

Also, counsel appears to us to ignore important conditions connected with the purchase and use of the scrip coupon ticket provided for by the order of March 6, which do not apply where the standard fare is paid. The purchaser of such a ticket must pay in advance for 2,500 miles of transportation, and must use personally all the coupons contained in the ticket within twelve months from the date of purchase in order to secure the full benefit of the reduction below the standard fare at which the ticket is to be sold by the carriers. If he does not use more than 2,000 miles within the period of twelve months he will receive no benefit at all, because, where the coupons are not all used during the period of limitation mentioned, and the purchaser presents the unused coupons for redemption, he is required to pay for what he has used the full standard fare.

In *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad Company*, 145 U. S. 263, this court declined to enforce compliance by the carrier with an order of the Commission which required the carrier to cease and desist from charging for the transportation of an individual between certain points a rate of fare greater than it contemporaneously exacted for transporting, over the same line in the same direc-

tion and between the same points, each individual in a party of ten or more under what was called a "party rate" ticket. In this connection the court said:

> The principal objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation; to prohibit unjust discriminations in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations or localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights. It was not designed, however, to prevent competition between different roads, or to interfere with the customary arrangements made by railway companies for reduced fares in consideration of increased mileage, where such reduction did not operate as an unjust discrimination against other persons travelling over the road. In other words, it was not intended to ignore the principle that one can sell at wholesale cheaper than at retail. It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust or unreasonable. * * *. (Id. 276.)

VI.

THE FACT THAT CERTAIN CARRIERS ARE EXEMPTED FROM THE OPERATION OF THE ORDER OF MARCH 6 DOES NOT RENDER THE ORDER INVALID.

In Paragraph XXI of their petition, petitioners call in question the action of the Commission in exempting certain carriers from the operation of the order of March 6, notwithstanding that, as shown by them in said paragraph, Congress conferred upon the Commission in said amendatory act of August 18, 1922, authority to make the exemptions. In this connection, however, we do not deem it necessary to make an extended argument, because counsel for appellees has not even attempted to show that, if appellees are required to comply with the order of March 6, they will be in any way injured by the exemptions.

In *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Railway Company*, 218 U. S. 88, certain carriers objected to action taken by the Commission which did not affect them adversely, and, in declaring the objection to be without merit, this court said:

> * * * That the companies may complain of the reduction made by the Commission so far as it affects their revenues is one thing. To complain of it as it may affect shippers or trade centers is another. We have said several times that we will not listen to a party who complains of a grievance which is not his. * * *. (Id. 109.)

VII.

THE ORDER OF MARCH 6 DOES NOT APPLY TO THE TRANSPORTATION OF PASSENGERS WHOLLY WITHIN ONE STATE.

Paragraph XXII of the petition reads as follows:

> The aforesaid order of the Commission of March 6, 1923, is unlawful and void because it is not restricted to interstate commerce, but, on the contrary, applies to and includes transportation of passengers wholly within one State. (Rec. 13.)

It is true that the order is not, by its terms, restricted to interstate commerce, but it does not, by its terms, include intrastate commerce, or transportation of passengers wholly within one State. It is further true, however, that the order need not be thus restricted, for the reason that, as shown by section 1 of the interstate commerce act, the jurisdiction of the Commission is not confined to transportation in interstate commerce; it includes also transportation in foreign commerce. Under these circumstances the court will not presume that the Commission intended to make the order apply to matters not within its jurisdiction.

In *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, this court had before it three paragraphs of section 1 of the interstate commerce act, the provisions of which were not, by their terms, confined to interstate and foreign commerce, and, in applying the rule of construction above mentioned and holding that the

provisions do not include matters which are purely intrastate in character, it said:

> If paragraphs 18, 19 and 20 be construed as authorizing the Commission to deal with the abandonment of such a road as to intrastate as well as interstate and foreign commerce, a serious question of their constitutional validity will be unavoidable. If they be given a more restricted construction, their validity will be undoubted. Of such a situation this court has said: "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." (Id. 217.)

It is clear, we submit, that the order of March 6 is susceptible of a construction which will confine its application to matters within the jurisdiction of the Commission, and we therefore feel certain that the court will not place upon it a contrary construction.

For the reasons above set forth, we insist that the decree of the lower court should be reversed.

Respectfully submitted,

P. J. FARRELL,
For Interstate Commerce Commission,
Appellant.

DECEMBER, 1923.

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